UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1630—August Term, 1993

(Argued: June 6, 1994 Decided: November 28, 1994)

Docket No. 93-9357

LYLE R. GOETZ, individually, and on behalf of all others similarly situated,

Plaintiff-Appellant,

MARK CANS and ANNA SELLETTI, individually, and on behalf of all others similarly situated,

Intervenors-Appellants,

—v.—

THE HONORABLE MATTHEW CROSSON, in his official capacity of chief administrator of the courts of New York, and DR. RICHARD C. SURLES, in his official capacity of Commissioner of the New York State Office of Mental Health,

Defendants-Appellees.

Before:

WINTER and WALKER, *Circuit Judges*,
and POLLACK, *District Judge.**

Plaintiffs appeal from a judgment of the United States District Court for the Southern District of New York (Goettel, *Judge*) granting summary judgment to the defendants. Appellants—involuntary patients in state mental institutions—argue that the procedures by which independent psychiatrists are appointed in involuntary commitment or retention proceedings in Dutchess County violate due process. Appellants further argue that the district court abused its discretion by restricting discovery.

Affirmed.

WILLIAM M. BROOKS, Mental Disability Law Clinic, Touro College, Huntington, New York, *for Plaintiff-Appellant and Intervenors-Appellants.*

BARBARA K. HATHAWAY, Assistant Attorney General of the State of New York (G. Oliver Koppell, Attorney General of the State of New York), *for Defendants-Appellees.*

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* The Honorable Milton Pollack, United States District Judge for the Southern District of New York, sitting by designation.

WINTER, *Circuit Judge*:

A class of involuntarily committed patients in New York State mental hospitals appeals from Judge Goettel's decision that New York's procedures for the appointment of independent psychiatrists in involuntary commitment or retention hearings, as applied in Dutchess County, comport with due process. The members of the class also challenge a discovery order of the district court. We affirm.

BACKGROUND

This action is before us for the second time. *See Goetz v. Crosson*, 967 F.2d 29 (2d Cir. 1992) ("*Goetz I*"). In the first appeal, we addressed appellants' claim that, *inter alia*, the Constitution required the State of New York to provide a psychiatrist to aid counsel to, and perhaps testify for, indigent persons subject to involuntary commitment or retention proceedings. We held that there is no constitutional right to the aid of such a psychiatrist in such proceedings. *Id.* at 34-35. However, we remanded for consideration of whether, if a judge presiding over an involuntary commitment or retention hearing determines that an independent psychiatrist's testimony is needed, New York's procedures—as applied in Dutchess County—for the appointment of such an independent psychiatrist meet constitutional standards. *Id.* at 36-37. We defined an independent psychiatrist as one "unassociated with the state, who will examine the patient and testify as to the need for institutionalization . . . regardless of whether the testimony supports or rejects commitment or retention. Such a psychiatrist also has no obligation to provide any other assistance to the patient or the patient's counsel." *Id.* at 31 n.1. The district court

thereafter held that the procedures did not violate the Constitution. *Goetz v. Crosson*, 838 F. Supp. 136 (S.D.N.Y. 1993). We assume familiarity with our prior decision.

We briefly set out the legal context in which the issues before us arose. Due process requirements impose two conditions that must be proven by clear and convincing evidence to commit or retain a person involuntarily. First, the person must be mentally ill and require involuntary treatment. Second, the person must pose a "substantial" threat of physical harm either to himself or others. These conditions are incorporated in the New York Mental Hygiene Law that governs involuntary civil commitment. N.Y. Mental Hyg. Law §§ 9.27-9.39 (McKinney 1988). The details concerning the procedures for commitment and retention are set out in our prior opinion. *Goetz I*, 967 F.2d at 31-32.

Before commitment, an involuntary patient is generally examined by at least two psychiatrists who must determine that the patient meets the requisite conditions. Following commitment, an involuntary patient has access to an elaborate process governing retention. Initially, a patient can be retained without court order for only sixty days. Subsequent orders for six months and thereafter one year may be obtained. The patient may request a hearing before a court to review a commitment and/or retention. Throughout these extensive proceedings, the patient has a right to counsel. If the patient cannot afford representation, then the court may appoint counsel. N.Y. Jud. Law § 35(1)(a) (McKinney 1983).

The court may appoint one or two psychiatrists to examine the patient and testify at commitment or retention hearings. These psychiatrists must give independent

opinions and may not be associated with the state. *Goetz I*, 967 F.2d at 31. As noted, we have referred to psychiatrists so appointed as "independent psychiatrists." *Id.* Independent psychiatrists are reimbursed for expenses and receive compensation. The statute specifies a maximum expenditure on compensation of $200 for one psychiatrist and $300 for two, but it also gives the court the authority to exceed these limits in "extraordinary circumstances." N.Y. Jud. Law § 35(4) (McKinney 1983).

Appellants assert that the appointment of an independent psychiatrist in Dutchess County delays the retention proceeding by four to six weeks due to (i) the fact that there is only one physician on the Dutchess County panel that provides independent psychiatrists and (ii) the low fees paid to independent psychiatrists.

DISCUSSION

To prevail on a motion for summary judgment, the moving party must demonstrate that (i) there are no genuine issues of material fact and (ii) the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In reviewing a grant of summary judgment, (i) we examine the record *de novo* and (ii) we also view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor. *See, e.g., Goetz I*, 967 F.2d at 33; *Dube v. State Univ. of New York*, 900 F.2d 587, 597 (2d Cir. 1990), *cert. denied*, 501 U.S. 1211 (1991).

Involuntary civil commitment proceedings result in a significant deprivation of liberty and therefore must satisfy due process. *Addington v. Texas*, 441 U.S. 418, 425

(1979); *see also Vitek v. Jones*, 445 U.S. 480, 491-92 (1980). The three-pronged balancing test enunciated by Justice Powell in *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976), provides guidance in determining whether delay in provision of an independent psychiatric evaluation, when required, comports with due process. *See Ake v. Oklahoma*, 470 U.S. 68, 77 (1985). The three factors are: (i) the interests of the patient in question that such procedures affect; (ii) the probable value of additional procedural safeguards, along with the possibility of erroneous deprivation of the patient's interests without such safeguards; and (iii) the governmental interests—including fiscal and administrative burdens—implicated by additional procedural safeguards. *See, e.g., id.*; *Mathews*, 424 U.S. at 335.

As to the first factor, the patient has a liberty interest implicated by the procedures used to appoint an independent psychiatrist. Involuntary commitment to a psychiatric facility is obviously a significant restriction on an individual's liberty. *Vitek*, 445 U.S. at 491-92; *Humphrey v. Cady*, 405 U.S. 504, 509 (1972); *Goetz I*, 967 F.2d at 33. In addition to the effects of the actual confinement, involuntary civil commitment upon a finding of dangerousness can damage an individual's reputation. *Addington*, 441 U.S. at 425-26; *Goetz I*, 967 F.2d at 33. The patient also has a financial interest at stake because the Department of Mental Hygiene can levy charges for care and treatment. *Goetz I*, 967 F.2d at 33.

Regarding the second *Mathews* factor—the probable value of the additional safeguards in question and possibility of an erroneous deprivation—a more prompt examination and report by an independent psychiatrist could have some value because it might in some cases prevent an erroneous deprivation. The value, of course,

would result from the reduced time that erroneously committed patients would spend in the facility. This time implicates the liberty, financial, and reputational interests of erroneously committed patients.

The damage to the patient's interests is limited, however, and does not involve the "massive curtailment of liberty" at issue in *Vitek*, *Humphrey*, and *Addington*. Appellants concede that a delay of two weeks would not violate any constitutional standard. At the outside, therefore, the damage to patients' interests involves a delay of two to four weeks in getting a hearing with the benefit of an assessment by an independent psychiatrist. Because there is no constitutional requirement of such an assessment, the damage to the patient's interests is limited to those cases in which the presiding judge desires the aid of an independent psychiatrist. *Goetz I*, 967 F.2d at 36. Moreover, the patients in question have already been examined by two psychiatrists, a procedure that clearly reduces the chances of an erroneous deprivation.

We believe the third *Mathews* factor is decisive. At bottom, swiftness or delay in obtaining the services of an independent psychiatrist is the result of the size of the pool of available psychiatrists in the geographic area who are not associated with the state and thus have a practice outside the institution in which the particular patient is confined. Such a practice will generally entail professional obligations, such as appointments with regular patients, that may preclude an immediate response to a request from a presiding judge in a commitment or retention hearing.

The delay of which appellants complain is thus directly related to the number of psychiatrists in or near Dutchess County who are not associated with the state.

Some of the psychiatrists in Dutchess County are associated with a state-run facility and thus are not suitable to serve as an independent psychiatrist. Those who are suitable generally have obligations that preclude them from acting immediately upon a request to serve as an independent psychiatrist.[1] Appellants suggest that the $200 payment for an independent psychiatric assessment is too low and a cause of the delay. However, the presiding judge has discretion to pay more when he or she believes it necessary, and the record reflects that payments in excess of $200 are made. At least one payment in excess of $1,000 is in the record. Moreover, the record does not support the conclusion that greater fees would eliminate the delay.

Appellants' benchmark for a constitutionally timely access to independent psychiatrists is Manhattan and the Bronx—where the delay is said to consist of one to two weeks. Because the procedures do not vary between counties, there is either a greater concentration, or less likely, greater underutilization, of psychiatrists in Manhattan and the Bronx than in Dutchess County. However, we do not believe that constitutional standards fashioned under *Mathews* are governed by the demographics of regions other than those in which the confinement or retention hearing is actually held. The third *Mathews* factor requires a hard look at the realities of

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[1] Appellants note that psychiatric reports in competency hearings for criminal defendants, *see* N.Y. Crim. Proc. Law §§ 730.10–730.70 (McKinney 1984), can be obtained more swiftly than in confinement hearings. However, the issues in a competency hearing—ability to understand the charges and participate in one's defense, *id.* § 730.10(1)—seem far less complex and more quickly resolved than the issues in a confinement hearing—danger to oneself or to others. Whereas the former issues may generally be resolved simply by interviewing the defendant, the latter issues generally require interviews of institution staff, friends of the patient, and relatives.

the case at hand, not a comparison to best-case scenarios.

What is lacking in appellants' arguments are practical remedies for the delay resulting from the number of psychiatrists available in Dutchess County. Appellants do not offer any credible evidence that additional psychiatrists, as yet unidentified, are available to conduct independent evaluations within Dutchess County. It would be possible, although quite expensive, for the state to retain psychiatrists on a stand-by basis—for example, to keep one day a week open—in case such an examination and report were requested. However, the independence of such a psychiatrist would be open to serious challenge because he or she would be receiving, and perhaps would be dependent upon, substantial amounts of money from the state for essentially no work. Indeed, one of the causes of the present litigation is appellants' suspicion that psychiatrists associated with the state harbor a preference for confinement. A psychiatrist retained by the state to be available at short notice would hardly escape a similar suspicion.

The state might also pay psychiatrists to commute from New York City to examine and report on a patient in Dutchess County. However, this remedy would be very expensive because commuting to Dutchess County to conduct an examination of the patient and interviews of others would require the absence of the physician from his or her regular office for at least a day—and perhaps days. The remedy thus also assumes the availability of psychiatrists who always have upcoming days entirely without appointments. The record does not support the proposition that such psychiatrists are regularly available, or that, if available, they would be suitable consultants. Moreover, a psychiatrist with the required

flexibility in scheduling would appear to earn little apart from periodic appointments in Dutchess County and would be deemed dependent upon income as a state-paid independent psychiatrist.[2]

Appellants' final claim is that the restrictions placed by the district court upon discovery constituted error. Discovery rulings are reviewed for abuse of discretion. *See Murphy v. International Business Machs. Corp.*, 23 F.3d 719, 722 (2d Cir. 1994), *cert. denied*, 63 U.S.L.W. 3246 (U.S. Oct. 3, 1994) (No. 94-215); *Gelb v. American Tel. & Tel. Co.*, 813 F. Supp. 1022, 1034 (S.D.N.Y. 1993). A district court abuses its discretion "when the action taken was improvident and affected the substantial rights of the parties." *In re Surety Ass'n of America*, 388 F.2d 412, 414 (2d Cir. 1967) (internal quotation omitted).

We do not believe that the record demonstrates a limitation of appellants' substantial rights. The scope of the remand was to determine the constitutionality of the procedures for appointing an independent psychiatrist "where the presiding judge determines that such testimony [of an independent psychiatrist] is necessary to a reliable assessment of a patient." *Goetz I*, 967 F.2d at 36-37. Therefore, the district court was within its discretion when it limited questioning to "what practical problems the state justices may have encountered in obtaining independent psychiatrists in those cases where they believe one should be appointed."

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[2] Appellants argue that the delay in obtaining the assistance of an independent psychiatrist chills patients in requesting such assistance. This argument applies only to those patients who expect to be discharged before such assistance would be available, and the asserted harm is again the delay in release. We see no need to add to the discussion in the text with regard to this argument.

The disallowance of questions relating to the processes of judicial decision was hardly error. *See Fayerweather v. Ritch*, 195 U.S. 276, 306-07 (1904). The inner workings of administrative decision making processes are almost never subject to discovery. *See, e.g., United States v. Morgan*, 313 U.S. 409, 422 (1941); *National Nutritional Foods Ass'n v. FDA*, 491 F.2d 1141, 1144-45 (2d Cir.), *cert. denied*, 419 U.S. 874 (1974); *McGoldrick v. Koch*, 110 F.R.D. 153, 155-56 (S.D.N.Y. 1986). Clearly, the inner workings of decision making by courts are kept in even greater confidence.

The judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 515—August Term, 1991

(Argued: November 15, 1991 Decided: June 10, 1992)

Docket No. 91-7761

LYLE R. GOETZ, individually, and on behalf of all others similarly situated,

Plaintiff-Appellant,

MARK CANS and ANNA SELLETTI, individually, and on behalf of all others similarly situated,

Intervenors-Appellants,

—v.—

The Honorable MATTHEW CROSSON, in his official capacity as chief administrator of the courts of New York; and DR. RICHARD C. SURLES, in his official capacity as Commissioner of the New York State Office of Mental Health,

Defendants-Appellees.

Before:

VAN GRAAFEILAND, NEWMAN and WINTER,

Circuit Judges.

Appeal from a decision of the United States District Court for the Southern District of New York (Gerard L. Goettel, *Judge*), granting summary judgment and dismissing appellants' action for a declaratory judgment that the Due Process Clause grants a person subject to involuntary civil commitment or retention proceedings a right to the assistance of a psychiatrist or, in the alternative, a right to the testimony of an independent psychiatrist.

Affirmed in part, reversed in part, and remanded. Judge Van Graafeiland concurs in part and dissents in part in a separate opinion. Judge Newman concurs in a separate opinion.

WILLIAM M. BROOKS, Huntington, New York (Mental Disability Law Clinic, Touro College, Huntington, New York, of counsel), *for Plaintiff-Appellant and Intervenors-Appellants.*

Herbert Semmel, Ellen M. Saideman, Cary Lacheen, New York Lawyers for the Public Interest, Inc., New York, New York, of counsel, *for Amici Curiae American Orthopsychiatric Association, Disability Advocates, Inc., Disability Law Center of New York Lawyers for the Public Interest, Inc., Mental Health Association in New York State, and Project Release.*

DENNIS J. SAFFRAN, Assistant Attorney General, New York, New York (Robert Abrams, Attorney General of the State of

New York, New York, New York, of counsel), *for Defendants-Appellees*.

WINTER, *Circuit Judge*:

This appeal concerns what sort of psychiatric assistance, if any, a state must provide to indigent individuals subject to involuntary commitment or retention proceedings. Judge Goettel held that New York's procedures governing such commitment or retention were constitutionally sufficient and entered summary judgment against the appellants. We agree with Judge Goettel that the Due Process Clause does not confer on involuntarily committed persons an absolute right to psychiatric assistance at commitment or retention proceedings. However, we cannot exclude the possibility that there are circumstances in which the participation of a psychiatrist unassociated with the state might be constitutionally mandated. Appellants have raised a number of issues of fact concerning the circumstances in which the appointment of such a psychiatrist might be required, and whether, as applied in Dutchess County, New York's procedures for appointing an independent psychiatrist are constitutionally sufficient. We therefore remand for further proceedings consistent with this opinion.

BACKGROUND

Lyle Goetz has been an involuntary patient at the Harlem Valley Psychiatric Center in Dutchess County, New York, since March 21, 1987. In December 1988, Goetz brought the instant class action in the Southern District seeking declaratory relief on three claims, only two

of which remain at issue. *See Goetz v. Crosson*, 728 F. Supp. 995, 1001-03 (S.D.N.Y. 1990) (dismissing appellants' Fifth Amendment claim).

Goetz alleged that New York State fails to provide indigent patients subject to involuntary commitment with constitutionally-required psychiatric assistance. Such assistance is alleged to involve the provision of a psychiatrist to perform two tasks in every commitment or retention hearing: (i) the psychiatrist would testify on behalf of the patient at a commitment or retention hearing "if the psychiatrist believes [the patient's] clinical condition warrants such testimony"; and (ii) the psychiatrist would assist counsel in the preparation of the patient's case, whether or not he or she believed that commitment or retention was appropriate. For purposes of this opinion, we shall style this role as a "consulting psychiatrist." Goetz alleged that New York's failure to provide a consulting psychiatrist in all commitment and retention hearings violates the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983. Goetz further alleged that New York's existing discretionary procedures for appointing a psychiatrist unassociated with the state to examine the patient and testify as to his or her condition at commitment or retention hearings, *see* N.Y. Jud. Law § 35(4) (McKinney Supp. 1992), do not satisfy the requisites of due process. In this opinion, we shall style such a psychiatrist an "independent psychiatrist."[1]

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1 By independent psychiatrist, we mean a psychiatrist unassociated with the state, who will examine the patient and testify as to the need for institutionalization. Such a psychiatrist will testify at commitment or retention hearings regardless of whether the testimony supports or rejects commitment or retention. Such a psychiatrist also has no obligation to provide any other assistance to the patient or the patient's counsel.

Judge Goettel certified the class, *Goetz*, 728 F. Supp. at 1003-04, and granted motions to intervene by Mark Cans and Anna Selletti, two involuntary patients at the Harlem Valley Psychiatric Center with claims similar to those made by Goetz. *Id.* at 998. In August 1990, appellants moved for summary judgment. Judge Goettel denied this motion, and, notwithstanding the lack of a motion by the state defendants, granted summary judgment against the appellants dismissing their entire complaint. Stating that there were no material issues of fact in dispute, Judge Goettel held that the Due Process Clause did not require the appointment of a consulting psychiatrist. He did not address appellants' claims regarding the appointment of an independent psychiatrist in appropriate cases.

DISCUSSION

A. *New York State's Civil Commitment Procedures*

We begin our analysis with a summary of New York law regarding involuntary civil commitment. There are two prerequisites to involuntary civil commitment, which, as a matter of federal constitutional law, must be proven by clear and convincing evidence. *See generally Addington v. Texas*, 441 U.S. 418, 431-33 (1979) (due process requires at least clear and convincing proof at civil commitment proceedings). First, the subject of the commitment proceedings must be mentally ill and "in need of involuntary care and treatment." N.Y. Mental Hyg. Law § 9.27(a) (McKinney 1988). A person is "in need of involuntary care and treatment" if he or she "has a mental illness for which care and treatment as a patient in a hospital is essential to such person's welfare and [his or her] judgment is so impaired that he [or she] is unable to

understand the need for such care and treatment." N.Y. Mental Hyg. Law § 9.01. Second, the subject must "pose[ ] a substantial threat of physical harm" to him or herself or to others. *In re Jeanette S.*, 550 N.Y.S.2d 383, 384 (App. Div. 1990); *see also O'Connor v. Donaldson*, 422 U.S. 563, 575-76 (1975) ("A finding of 'mental illness' alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement. . . . [A] State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.").

A subject of a commitment proceeding may be committed to a mental health institution upon the application of a relative or other qualified person and the certification of two examining physicians. Prior to admission, a third physician who is a member of the psychiatric staff of the institution must examine the individual and confirm the need for involuntary care and treatment. N.Y. Mental Hyg. Law § 9.27(e). Alternatively, in cases where a need for immediate in-patient treatment exists and where there is a substantial risk of physical harm to the patient or others because of the patient's mental illness, a director of community services may make an application for involuntary commitment. The subject of such an application may be admitted if a staff physician confirms the need for immediate hospitalization. Within seventy-two hours of admission, a second examining physician must certify that involuntary treatment is appropriate. N.Y. Mental Hyg. Law § 9.37(a). There are also procedures for emergency admission. N.Y. Mental Hyg. Law § 9.39.

No matter what the particular path leading to involuntary commitment, the involuntarily committed patient

thereafter becomes the beneficiary of a rather elaborate procedural scheme for notice, hearing, review, and judicial approval of continued retention in a mental health facility. *See* N.Y. Mental Hyg. Law §§ 9.29-9.35, 9.37(a), 9.39(b). The period of retention without court approval is limited to sixty days.[2] N.Y. Mental Hyg. Law § 9.33(a). At any time during this period the patient may request a hearing on the need for continued commitment. A hearing must be held within five days of such a request after which the court may grant or deny the patient's application for release. N.Y. Mental Hyg. Law § 9.31.

The institution must release the involuntarily committed patient within either thirty days of the denial of an application for release or sixty days after the initial commitment, whichever is later. N.Y. Mental Hyg. Law § 9.33(a). If the staff of the facility believes that the patient needs further institutionalization, they have the burden of obtaining court authorization to retain the involuntary patient. *Id.* The patient may request a hearing to determine whether the court should issue a retention order. The failure to make such a request within five days of receiving written notice of an application for retention may result in the entry of an order of retention without a hearing. *Id.* Such a retention order is effective for six months. N.Y. Mental Hyg. Law § 9.33(b). At the end of six months, the staff of the facility, following the same procedures, may obtain a retention order effective for up to an additional year. N.Y. Mental Hyg. Law § 9.33(d). Subsequently issued retention orders are effective for up to a maximum of two years. *Id.*

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2 Those initially admitted on an emergency basis may be confined for an additional fifteen days. N.Y. Mental Hyg. Law § 9.39(b).

Within thirty days of the issuance of any retention order, the involuntarily committed patient may request a rehearing and review of the order by a judge other than the one who signed the original order. At this stage the patient has the right to a jury trial. N.Y. Mental Hyg. Law § 9.35.

A patient has the right to counsel during all of these proceedings, including counsel paid by the state where the patient cannot afford one, N.Y. Jud. Law § 35(1)(a). In addition, during any retention hearing, the court may appoint up to two independent psychiatrists to examine the patient and testify at the particular hearing. N.Y. Jud. Law § 35(4) (McKinney Supp. 1992). A psychiatrist so appointed may be paid up to $200. If two independent psychiatrists are appointed, their combined compensation is limited to $300. However, the court may, in "extraordinary circumstances" approve compensation in excess of these limits. *Id.*

We upheld New York's involuntary civil commitment procedures when they were challenged as facially unconstitutional in *Project Release v. Prevost*, 722 F.2d 960 (2d Cir. 1983). Appellants, however, raise slightly different issues. They argue that, in addition to New York's existing procedures, due process requires that the state appoint a consulting psychiatrist, as defined *supra*. They also argue that, facially and as applied in Duchess County, New York, Section 35(4) of the New York Judiciary Law fails to satisfy what they identify as a patient's more limited right to the testimony of an independent psychiatrist.

B. *The Right to a Consulting Psychiatrist*

In reviewing a grant of summary judgment, we examine the record *de novo*, and view the evidence in the light

most favorable to the party opposing summary judgment. *See, e.g., Dube v. State University of New York*, 900 F.2d 587, 597 (2d Cir. 1990).

We first examine whether the Due Process Clause requires New York State to provide an indigent involuntary patient with the services of a consulting psychiatrist. The Supreme Court has held that a state must provide an indigent criminal defendant with the assistance of a psychiatrist when the defendant places at issue his sanity at the time of the offense. *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985). Appellants analogize the patient subject to involuntary commitment to the criminal defendant because each has a liberty interest in the outcome of the relevant proceedings. Because of this parallel interest, appellants insist that the patient subject to involuntary commitment, like the criminal defendant who pleads insanity, has a right to the assistance of a consulting psychiatrist. However, while *Ake* is relevant, it does not control our decision in light of other Supreme Court precedent clearly indicating that constitutional protections granted criminal defendants are not automatically extended to civil commitment proceedings. *Cf. Addington*, 441 U.S. at 428 ("a civil commitment proceeding can in no sense be equated to a criminal prosecution").[3]

Because significant liberty interests are at stake, involuntary civil commitment proceedings must satisfy due process, *Vitek v. Jones*, 445 U.S. 480, 491-92 (1980);

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3 Even the criminal defendant who wishes to plead insanity does not have an automatic right to the assistance of a psychiatrist. Instead, the criminal defendant must make a threshold showing that his sanity will be a "significant factor" at his trial before the right to a psychiatrist attaches. *Ake*, 470 U.S. at 82-83. This issue does not arise in commitment or retention proceedings because the state has by definition put the subject's mental illness in issue.

Addington, 441 U.S. at 425, as guided by three factors: (i) the interests of the individual subject to involuntary commitment; (ii) the governmental interest affected by the provision of additional safeguards; and (iii) the risk of erroneous deprivation of the individual's interests without additional safeguards, and the probable value, if any, of such additional safeguards. *Ake*, 470 U.S. at 77; *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Erroneous commitments, of course, implicate the individual's interest in liberty. *See, e.g., Addington*, 441 U.S. at 425. Appellants emphasize this interest and identify additional ways in which an erroneous commitment may cause harm, including the stigma of being labelled mentally ill by the state, the potential financial loss to the patient, who, if able, must pay part of the cost of treatment while committed, and the possibility of psychological harm to the patient resulting from the commitment. However, erroneous non-commitments or releases also implicate other interests of the individual that must be considered in due process analysis. There is thus an interest in receiving treatment for one's mental illness. There is also an interest in avoiding situations in which the individual harms him or herself. Finally, the individual benefits from not harming, or threatening to harm, third parties, actions that might lead to criminal incarceration or injury to the individual through responsive acts of self-defense by the third parties.

The governmental interest is primarily financial. According to the state defendants, providing every indigent involuntary patient with a consulting psychiatrist would entail large expenditures. Appellants dispute this claim and suggest that providing indigent patients with a consulting psychiatrist may in fact save state money by reducing the number of persons involuntarily committed.

Although the state's assessment of fiscal consequences is far more certain than that of appellants, a closer scrutiny of those consequences is unnecessary because of the third element of due process analysis.

This element compels us to evaluate the probable value of a consulting psychiatrist and the risk of error if such assistance is not provided. Relevant to this inquiry are the safeguards and procedures that currently exist to protect against erroneous commitment. Also relevant are the unique nature of civil commitment proceedings and the dual goals of involuntary commitment—to provide care and treatment to those unable to care for themselves and to protect the individual and society from those who pose a danger to themselves and others because of mental illness. *See Addington*, 441 U.S. at 426.

We conclude that the due process clause does not require a state to provide an indigent patient with a consulting psychiatrist in every commitment or retention proceeding. Such a psychiatrist would perform two functions: (i) providing testimony favorable to non-commitment or release if the psychiatrist's professional judgment so warrants; and (ii) providing assistance to counsel in preparing the patient's case even where the doctor favors commitment or retention. These functions are not of sufficient import to implicate due process in every proceeding.

We examine first the need for testimony by a consulting psychiatrist. Presently, a psychiatrist testifies at commitment or retention hearings on behalf of New York State and opines as to why the patient needs involuntary treatment. If the hearing judge believes additional expert testimony is warranted, an independent psychiatrist may examine the patient and testify at the hearing. N.Y. Jud.

Law § 35(4) (McKinney Supp. 1992). The patient's attorney has an opportunity to cross-examine these experts, as well as any other adverse witnesses. If a consulting psychiatrist were to testify, his or her testimony would, by definition, favor release and thus would to some degree contradict the conclusions of the state's witnesses.

Psychiatrists often disagree about the proper diagnosis and treatment of particular patients, *see Addington*, 441 U.S. at 429-30, and we can assume that psychiatrists may also be unable to predict future dangerousness with great certainty, *see Barefoot v. Estelle*, 463 U.S. 880, 900 n.7 (1983). We may also assume that some psychiatrists tend to favor institutionalization more often than others who tend to favor release. However, we have no basis for assuming that psychiatrists associated with the state have a bias toward institutionalization.

Given these assumptions, we may conclude that the provision of a consulting psychiatrist in every commitment or retention proceeding will increase the number of instances in which conflicting psychiatric testimony is given. We may also conclude that the increase in conflicting psychiatric testimony may to some indeterminant degree decrease the number of commitments and retentions. However, a decrease in the number of commitments or retentions is not the same as a decrease in the number of erroneous adjudications, which is the focus of due process analysis. The consulting psychiatrist will not always be right and the state psychiatrist always wrong, or vice-versa.

In the ordinary adversary system, we tolerate and sometimes require a "battle of the experts" because it is thought to increase the accuracy of a trial's outcome. *See, e.g., Ake*, 470 U.S. at 81 (In a criminal prosecution where

defendant's insanity is at issue, competing testimony of psychiatrists enables jury "to make its most accurate determination of the truth on the issue before them."). The logic underlying the "battle of the experts" in criminal proceedings does not hold in the context of civil commitment proceedings, however. Unlike civil or criminal proceedings, the interests of the parties to a civil commitment proceeding are not entirely adverse. The state's concerns are to provide care to those whose mental disorders render them unable to care for themselves and to protect both the community and the individuals themselves from dangerous manifestations of their mental illness. *Addington*, 441 U.S. at 426. A major component of the state policy is thus the protection of mentally ill individuals, as recognized by New York's provision of multiple and repetitive opportunities for involuntary patients to obtain release. And finally, "[i]t cannot be said . . . that it is much better for a mentally ill person to 'go free' than for a mentally normal person to be committed." *Addington*, 441 U.S. at 429.

The goals of due process in these circumstances are thus to provide procedures that protect against erroneous non-commitments and releases as well as against erroneous confinements. Although the testimony of a consulting psychiatrist may be assumed to move adjudicators toward the latter goal, it must also be assumed to move adjudicators away from the former goal. However, the goals may not be of equal weight. Erroneous confinements may cause greater harm than erroneous non-commitments or releases, and, while the testimony of consulting psychiatrists may not alter the number of erroneous adjudications, we can speculate that it will reduce the most harmful errors.

However, the consulting psychiatrist's function of providing favorable testimony overlaps with the function performed by independent psychiatrists, at least when the independent psychiatrist favors non-commitment or release. Indeed, a court-appointed psychiatrist, whether designated as independent or consulting, is likely to be the same person. The only difference, therefore, is that a consulting psychiatrist would not testify if he or she favored commitment, whereas an independent psychiatrist would. But appellants do not claim that they are entitled either to a consulting psychiatrist who favors non-commitment or release or to exclude adverse psychiatric testimony. Appointment of a consulting psychiatrist will not, therefore, provide favorable testimony beyond that available from a court-appointed independent psychiatrist. Appellants' right to a testifying psychiatrist, therefore, is fulfilled so long as constitutionally adequate procedures exist for the appointment of an independent psychiatrist.

We turn now to appellants' claim that the Due Process Clause requires the appointment of a consulting psychiatrist even when such a doctor cannot as a professional matter give testimony favorable to the patient's release. The responsibilities of the consulting psychiatrist would include, for example, suggesting strategies for cross-examining the state psychiatrist even though the consulting psychiatrist also believes that commitment is essential.

We do not believe the Due Process Clause always imposes such a requirement. The function of assistance to counsel is not one that we believe to be so significant that it is required in all cases. In some cases, evidence of dangerousness and mental illness other than the testimony of the state psychiatrist may be decisive. In other cases, we are confident that counsel will be able to gain a sufficient

level of expertise as to psychiatric matters to meet due process requirements. The need for litigators to become learned in other fields is not uncommon today, and we see no basis for compelling the state to provide a consulting psychiatrist in every commitment or retention proceeding. However, we acknowledge that there may be a limited number of cases in which counsel can show by affidavit a compelling fact-specific need for a consulting psychiatrist to educate counsel in particular aspects of a case. We limit the role to education in the complexities of psychiatric diagnosis because we believe that providing assistance in trial strategy might pose a dilemma for a psychiatrist whose professional judgment favored commitment. Such assistance might well entail the pressing of arguments believed by the psychiatrist to be irrelevant, specious, or misleading. In any event, no such affidavit has been filed with regard to any plaintiff in the instant matter, and we therefore leave further consideration of such a limited right to future cases.

C. *The Right to an Independent Psychiatrist*

The allegations of appellants' complaint suggest a second, related claim. Some proceedings may present a need for independent psychiatric testimony in addition to that offered by the state to ensure an accurate decision. As a practical matter such proceedings are limited to cases in which the presiding judge determines that the record leaves unexplored or unanswered questions and that additional psychiatric testimony is necessary. In such cases, the individual's interests in both freedom and self-protection are directly affected, and the failure to provide such testimony may implicate due process concerns. Appellants' second claim, therefore, concerns the adequacy of

New York's procedures for the appointment of an independent psychiatrist.

Section 35(4) of the New York Judiciary Law permits a judge conducting a commitment hearing to appoint an independent psychiatrist to examine the patient and testify as to the patient's condition. N.Y. Jud. Law § 35(4) (1992). In their complaint, appellants allege numerous deficiencies in the way Section 35(4) has been applied in Dutchess County. These include allegations that: (i) independent psychiatrists are infrequently used; (ii) only one psychiatrist is available to act as a court-appointed expert in Dutchess County, causing long delays in commitment hearings; and (iii) limitations on the compensation to be paid to court-appointed psychiatrists for their testimony reduces the number of psychiatrists willing to accept such appointments. Based on these allegations, appellants ask for, *inter alia*, a declaration that Section 35(4)'s application in Dutchess County "fails to satisfy the requirements of independent psychiatrist [sic] assistance that the Fourteenth Amendment to the United States Constitution imposes."

This claim was never addressed by Judge Goettel because of the procedural posture of the case when he granted summary judgment against appellants. At that time, the only motion for summary judgment had been made by appellants themselves, and their papers addressed only their broadest claim, namely a right in every commitment or retention proceeding to a consulting psychiatrist. While it might have been harmless to use appellants' motion as the vehicle for dismissing what is a facial claim on a record that needed no amplification as to that claim, appellants' motion did not provide a record suited to dismissal of their second, fact-based claim.

We cannot exclude the possibility that this narrower claim may have merit. Where the trier believes that an accurate assessment of the subject's psychiatric condition cannot be reliably made without the aid of an independent psychiatrist, and the subject is financially unable to procure such testimony, a cognizable due process concern may arise. The liberty and self-protection interests of the subject are at stake, the fiscal consequences to the state are far more attenuated than in the case of a claim to a consulting or independent psychiatrist in every commitment or retention proceeding, and the danger of an inaccurate ruling is established by the trier's judgment that independent psychiatric testimony is necessary. Of course, because of the non-adversary nature of such a proceeding, the independent psychiatric testimony may favor commitment or retention, the reason, perhaps, that appellants' counsel has not emphasized the narrower claim.

Whether New York's procedures sometimes do not provide access to the testimony of an independent psychiatrist when the presiding judge believes such testimony to be necessary cannot be determined on the record before us. We therefore remand for further proceedings on this claim.

CONCLUSION

In sum, the Due Process Clause does not grant an indigent individual subject to involuntary commitment an absolute right to the assistance of a consulting psychiatrist. Such a right might arise in a case in which counsel has shown a compelling fact-specific need for the assistance of a psychiatrist to educate counsel in particular aspects of a case. No such showing has been made with regard to any plaintiff in the instant matter. Nor is there an

absolute right to the assistance of an independent psychiatrist. However, where the presiding judge determines that such testimony is necessary to a reliable assessment of a patient, an indigent individual should have the right to obtain the testimony of an independent psychiatrist. The facts are not sufficiently developed for us to determine whether New York affords such a right, and we thus remand to the district court to determine whether New York's procedure for appointing a psychiatrist, as applied in Dutchess County, satisfies constitutional standards.

VAN GRAAFEILAND, *Circuit Judge*, concurring in part and dissenting in part:

Section 35(4) of New York's Judiciary Law provides that when a court orders a hearing to determine whether a person should be committed to or retained in a State mental institution, it "may appoint no more than two psychiatrists, certified psychologists or physicians to examine and testify at the hearing upon the condition of such person." This codifies the historically-recognized, inherent power of a court to appoint disinterested expert witnesses to aid it in determining scientific issues. *See Scott v. Spanjer Bros., Inc.*, 298 F.2d 928, 930 (2d Cir. 1962). Crucial to the effective use of this practice is the requirement that the experts so appointed be independent and disinterested. *See People ex rel. Sweeting v. Johnston*, 26 A.D.2d 685 (1966) (mem.); *People ex rel. Butler v. McNeill*, 30 Misc. 2d 722, 728 (Sup. Ct. 1961). "A court-appointed medical expert who expresses his professional opinion in a trial is not a partisan, but is, in effect, the court's witness." *Massey v. The District Court*, 180 Colo. 359, 365 (1973). In the absence proof to the contrary, we may assume that

no State judge will appoint experts who are not disinterested and independent. We are encouraged in this assumption by our recognition of the duty that the State imposes upon the Mental Hygiene Legal Service to assist the court in obtaining section 35 expert opinion and to see that all requirements of law as to patients' admissions, treatment and discharge which affect patients' rights have been complied with. *See* N.Y. Mental Hyg. Law §§ 47.01, 47.03; McKinney's 1992 New York Rules of Court §§ 694.2, 694.4; *Ughetto v. Acrish*, 130 A.D.2d 12, 21-22, *appeal dismissed mem.*, 70 N.Y.2d 871 (1987). Indeed, in view of the hospital's legal duty and medical purpose to subject mentally disturbed persons to the least restrictive and shortest institutionalized treatment possible, *see* 14 NYCRR Part 36, Section 36.1, it ordinarily may be assumed that hospital officials themselves are not biased in favor of a different methodology. *See United States v. LaFromboise*, 836 F.2d 1149, 1152 (8th Cir. 1988); *Williams v. Wallis*, 734 F.2d 1434, 1438 (11th Cir. 1984); *cf. Youngberg v. Romeo*, 457 U.S. 307, 323 (1982); *Society for Good Will to Retarded Children, Inc. v. Cuomo*, 737 F.2d 1239, 1248 (2d Cir. 1984).

Appellants insist, however, that the proceeding by which the need for hospital care is determined must be treated as an adversary one. They demand the right to obtain at State expense the services of an expert whose report will not be available for review by State officials and whose testimony, if given, will be contradictory to that of the medical experts employed by the State or appointed by the court. This, I suggest, misconceives the role of a patient's attorney, which should be to see that the client gets such care and treatment as the clients needs, not to treat the State as an adversary to be fought tooth and nail whenever the client's liberty is threatened. I have

no doubt that, if sufficient funds are made available to a patient's lawyer, the lawyer will be able to find an "expert" to testify that the patient does not require hospitalization. "Experience has shown that an 'expert' can be found to support almost any position if one searches long enough and pays well enough." *LeFebre v. Westinghouse Elec. Corp.*, 747 F.2d 197, 208 (4th Cir. 1984). That kind of expert testimony might fit quite comfortably into a murder trial. It seems out of place in a civil competency hearing where the "modern concept of handling cases of mental illness is treatment, not simply incarceration," and the objective of both the state and the patient is to return the patient to society as soon as "it is likely to be safe for others and helpful to the patient." *St. George v. State*, 283 A.D. 245, 248, *aff'd*, 308 N.Y. 681 (1954).

For the foregoing reasons and others capably expressed in Judge Winter's opinion, I agree with Judge Winter that no patient has an absolute right to the State-financed assistance of either a testifying or consulting expert. I am troubled, however, by my colleague's decision to make the State judge's finding of a "need" for such assistance into a constitutional requirement that the State must provide it. The State has the burden of proving by clear and convincing evidence the necessity of institutionalization. *Matter of Harry M.*, 96 A.D.2d 201, 208 (1983). If the testimony of attending physicians and section 35 medical experts does not satisfy the State court that this burden has been met, there is no need for the State to underwrite the hiring of an interested witness to testify to that effect.

The State's plan provides for the appointment of up to two independent, disinterested psychiatrists and limits the amount that they can be paid. As I understand the plan proposed by my colleagues, it calls into question not only the appointment of a third expert, who is interested, but

also the amount of his remuneration, and perforce the remuneration of the section 35 experts, which presently has a $200-$300 cap. In addition, the district court, upon remand, will have to take into account the alleged shortage of independent psychiatrists in Duchess County, the likely duration of such shortage, and its effect on the $200-$300 statutory cap. A federal court is ill-equipped to determine what adjustments, if any, should be made, and is ill-advised to force such adjustments on the State of New York as being mandated by the United States Constitution.

I either would deny appellants all relief, without prejudice to relief being sought in the State courts, or would abstain from any decision in the matter pending a resolution in the State courts of the issues raised herein. *See Reetz v. Bozanich*, 397 U.S. 82, 85-86 (1970); *Harrison v. N.A.A.C.P.*, 360 U.S. 167, 176-77 (1959); *Logan v. Arafeh*, 346 F. Supp. 1265, 1271-72 (D. Conn. 1972) (three-judge court), *aff'd mem.*, 411 U.S. 911 (1973).

JON O. NEWMAN, *Circuit Judge*, concurring:

I concur in Judge Winter's opinion and add these few words only to point out the hazard of reading too much into the quotation from the Supreme Court's opinion in *Addington v. Texas*, 441 U.S. 418, 429 (1979), concerning the relative consequences of releasing a mentally ill person and committing a mentally normal person.

Initially, we should bear in mind precisely what the Supreme Court said and the context in which it was said. Chief Justice Burger's opinion began the pertinent discussion by pointing out that "it is not true that the release

of a genuinely mentally ill person is no worse for the individual than the failure to convict the guilty." *Id.* This was so, he continued, because "[o]ne who is suffering from a debilitating mental illness and in need of treatment is neither wholly at liberty nor free of stigma." *Id.* (citations omitted). That set the stage for the sentence Judge Winter quotes:

> It cannot be said, therefore, that it is much better for a mentally ill person to "go free" than for a mentally normal person to be committed.

Id.

The quoted sentence must not be understood to mean that committing a mentally normal person is no worse a consequence than releasing a mentally ill person. That is not what the sentence says. At most, it denies that it is "much better" to release a mentally ill person than to commit a mentally normal person. But the sentence surely does not deny that it remains better to release a mentally ill person than to commit a mentally normal person. And that is how the balance of consequences must be struck. It is true that releasing a mentally ill person has adverse consequences for that person. The person forgoes, or at least postpones the receipt of, needed treatment. But it cannot be that such consequences are equal to the consequences of committing a mentally normal person.

The wrongful deprivation of liberty under any circumstances is among the most grievous harms that society can inflict. Wrongful confinement in a mental hospital is a horrendous consequence. In addition, no matter how much care is exercised in the diagnosis of mental illness, it is inevitable that large numbers of mentally ill persons will not be diagnosed and will remain at liberty. A civilized society must therefore acknowledge that, if mistakes

are to be made, it is better to add one more mentally ill person to the population at liberty than to place within the asylum one person who is mentally normal.

The quoted sentence from *Addington* was written to contrast the relative risks of error that will be tolerated in the mental illness context from those that will be tolerated in the context of criminal conviction. *See id.* at 428-29. We usually say that it is better that some number of guilty persons go free than that one innocent person be imprisoned, though we might not all agree on the number of wrongful acquittals we are willing to accept to guard against one wrongful conviction. One familiar version is that it is better that ten guilty persons go free than that one innocent person is convicted, *see* 4 William Blackstone, *Commentaries* ch. 27, p. 358, a formula sometimes recounted in our criminal jurisprudence, *see, e.g., Furman v. Georgia*, 408 U.S. 238, 367 n. 158 (1972) (Marshall, J., concurring) (quoting William O. Douglas, Foreword in Jerome Frank and Barbara Frank, *Not Guilty* 11-12 (1957)); *Bunnell v. Sullivan*, 947 F.2d 341, 352 (9th Cir. 1991) (in banc) (Kozinski, J., concurring); *United States v. Greer*, 538 F.2d 437, 441 (D.C. Cir. 1976)[1]. However one might set the ratio in the criminal context, it is surely arguable that some lesser ratio should apply in the mental illness context. If ten to one is appropriate in the crim-

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1 More generous ratios have been expressed. *See, e.g.*, Sir John Fortescue, *De Laudibus Legum Angliae*, ch. 27, p. 65 (originally written 1471, republished in Dr. Chrimes ed., Cambridge Univ. Press 1949) ("I should, indeed, prefer twenty guilty men to escape death through mercy, than one innocent to be condemned unjustly); Thomas Starkie, *Evidence* 756 (1824), *quoted in* IX Wigmore on Evidence § 2497 at 409-10 (Chadbourn rev. 1981) ("The maxim of the law is that it is better that ninety-nine . . . offenders shall escape than that one innocent man be condemned."). Many respected jurists have simply remarked that "it is far worse to convict an innocent man than to let a guilty man go free." *See, e.g., In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

inal context, then perhaps one could plausibly say that it is better that five or perhaps three mentally ill persons be released than that one mentally sound person be confined. The lower ratio reflects both the harmful consequence to the person if a mentally ill person is erroneously released and the continuing review of confinement that occurs in the mental health context but not in the criminal context. Whatever ratio one prefers in the mental illness context, my point is that we cannot reasonably say that releasing one mentally ill person is equal to confining one mentally sound person. Some ratio greater than one to one must be used.

Whatever ratio one selects, procedural protections must be fashioned to give some reasonable assurance that the pattern of erroneous releases and erroneous confinements will approximate the ratio that one finds tolerable. And in setting the ratio and formulating the appropriate procedural protections to achieve it, we would do well to consider the matter from behind John Rawls's veil of ignorance: we should select a pattern we would find tolerable not knowing whether we would be one of those erroneously released or one of those erroneously confined. *See* John Rawls, *A Theory of Justice* ch. 24 (1971).

These considerations ought to bear heavily on the implementation of the flexible due process standard that Judge Winter's opinion sensibly leaves for case-by-case development. The decision whether to afford the committed person the assistance of a consultant psychiatrist must be made in light of the fact that it is indeed better (even if not "much" better) to release a mentally ill person than to confine a mentally normal person. Of course, the appointment of a consultant psychiatrist does not necessarily mean that there will be an ultimate decision to release, much less a decision to release a mentally ill per-

son. All it means is that the adversary process will function on a more informed basis, leaving to the state court judge the final ruling as to whether confinement should be continued or ended.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

88 Civ. 9134 (GLG)

LYLE R. GOETZ, individually, and
on behalf of all others similarly situated,

Plaintiff,

MARK CANS and ANNA SELLETTI, individually, and
on behalf of all others similarly situated,

Intervenors,

—against—

The Honorable MATTHEW CROSSON, in his official capacity of chief administrator of the courts of New York, and DR. RICHARD C. SURLES, in his official capacity of Commissioner of the New York State Office of Mental Health,

Defendants.

APPEARANCES:

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OPINION

GOETTEL, D.J.:

This case began with the allegation by plaintiffs that, *inter alia*, the Fourteenth Amendment's due process clause required the State of New York to provide a psychiatrist to indigent individuals subject to involuntary commitment or retention proceedings to testify on their behalf. This court held that the due process clause does not confer an absolute right to such assistance. *Goetz v. Crosson*, 769 F. Supp. 132 (S.D.N.Y. 1991). The Second Circuit affirmed this holding, 967 F.2d 29 (2d Cir. 1992), but remanded for consideration of another, narrower issue: whether alleged deficiencies in the process of obtaining independent psychiatrists for involuntary commitment and retention hearings in Dutchess County, when the presiding judge believes that such testimony is necessary, create a constitutional violation. Having completed discovery, both sides now move for summary judgment.

We will presume familiarity with the decisions mentioned above, as well as with our decision granting motions for intervention and class certification, and dismissing plaintiffs' claim relating to the Fifth Amendment privilege against self-incrimination. *See Goetz v. Crosson*, 728 F.Supp. 995 (S.D.N.Y. 1990). Therefore, we will not revisit the entire history of this case.

FACTS

Under New York law, the state may involuntarily hospitalize a person alleged to be mentally ill and in need of care upon the certification of two examining physicians. N.Y. Mental Hyg. Law § 9.27(a). The constitution also requires clear and convincing proof that the mentally ill person poses a substantial threat of physical harm to him or herself or to others. *Goetz*, 967 F.2d at 31. This period of involuntary hospitalization may not exceed sixty days without court approval. N.Y. Mental Hyg. Law § 9.33(a). At any time during this period, the person involuntarily admitted may request a hearing on the need for continued involuntary care, which must be held within five days of the request. New York Mental Hyg. Law § 9.31.

The institution must, absent further proceedings, release the patient within sixty days of the involuntary commitment or thirty days after the denial of an application for release, whichever is later. New York Mental Hyg. Law § 9.33(a). If the institution's director determines that further involuntary hospitalization is required, he may apply to the state court for a retention order, which is effective for an additional six months. New York Mental Hyg. Law § 9.33(a),(b). The patient may request a hearing to challenge the requested detention order, which must be held within five days of the request. New York Mental Hyg. Law § 9.33(a),(c). When the six months have expired, the institution may obtain another retention order effective for up to an additional year. New York Mental Hyg. Law § 9.33(d). The institution may obtain further retention orders, each effective for up to two years. *Id.* All of these retention orders may be similarly challenged by the patient. *Id.*

The involuntarily admitted patient may request a rehearing and review of any retention order by a judge other than the one who signed the original order. The patient also has the right to a jury trial. N.Y. Mental Hyg. Law § 9.35. A patient has the right to counsel during all these proceedings for involuntary commitment or retention, including court-appointed

counsel if the patient is financially unable to obtain representation. N.Y. Judiciary Law § 35(1)(a). During these proceedings, the court may appoint up to two psychiatrists to examine the patient and testify at the hearing. N.Y. Judiciary Law § 35(4). Psychiatrists employed at a state institution are not eligible for such appointment. N.Y. Court Rules § 822.3. The Second Circuit has labeled psychiatrists so appointed "independent psychiatrists." *Goetz*, 967 F.2d at 31.

Independent psychiatrists "receive reimbursement for expenses reasonably incurred and reasonable compensation for such services." N.Y. Judiciary Law § 35(4). Such compensation may not exceed $200 for one psychiatrist or $300 for two psychiatrists, although in "extraordinary circumstances" the court can exceed these limits. *Id.*

Both parties agree that the appointment of an independent psychiatrist generally results in a delay of at least a month in the affected court proceeding (four to six weeks, in the words of the plaintiffs; four to five weeks, in the words of the defendants), while disagreeing on the causes and legal import of the delay.

THE DECISION OF THE SECOND CIRCUIT

In affirming this court's conclusion that indigent patients contesting their commitment or retention have no necessary or absolute right to a psychiatrist to act as their expert witness, the Second Circuit emphasized the role of independent psychiatrists: "Appellants' right to a testifying psychiatrist, therefore, is fulfilled so long as constitutionally adequate procedures exist for the appointment of an independent psychiatrist." 967 F.2d at 35.

The court went on to describe the problems with obtaining independent psychiatrists alleged by plaintiffs in their appeal:

> In their complaint, appellants allege numerous deficiencies in the way Section 35(4) has been applied in Dutchess County. These include allegations that: (i) independent psychiatrists are infrequently used; (ii) only one psychiatrist is available to act as a court-appointed

> expert in Dutchess County, causing long delays in commitment hearings; and (iii) limitations on the compensation to be paid to court-appointed psychiatrists for their testimony reduces the number of psychiatrists willing to accept such appointments.

Id. at 36.

The court explained why these allegations required further consideration by this court:

> Where the trier believes that an accurate assessment of the subject's psychiatric condition cannot be reliably made without the aid of an independent psychiatrist, and the subject is financially unable to procure such testimony, a cognizable due process concern may arise. The liberty and self-protection interests of the subject are at stake, the fiscal consequences to the state are far more attenuated than in the case of a claim to a consulting or independent psychiatrist in every commitment or retention proceeding, and the danger of an inaccurate ruling is established by the trier's judgment that independent psychiatric testimony is necessary. . . .
>
> Whether New York's procedures sometimes do not provide access to the testimony of an independent psychiatrist when the presiding judge believes such testimony to be necessary cannot be determined on the record before us. We therefore remand for further proceedings on this claim.

Id.

The majority opinion did not, however, give any indication of what this court should do were we to find a constitutional violation.

DISCUSSION

The governing law on this issue is the due process clause of the Fourteenth Amendment. It is firmly established that since involuntary civil commitment proceedings can lead to a sig-

nificant deprivation of liberty, they must satisfy due process. *See Vitek v. Jones*, 445 U.S. 480, 491-92 (1980); *Addington v. Texas*, 441 U.S. 418, 425 (1979).Three factors guide the courts in evaluating the constitutionality of a challenged procedure: (i) the interests of the individuals affected by the procedure; (ii) the probable value of additional safeguards, and the risk of erroneous deprivation of the individuals' interests without such safeguards, and (iii) the governmental interest that will be affected by additional safeguards, including the fiscal and administrative burden. *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Due process analysis also turns on fundamental fairness. *Project Release*, 722 F.2d at 975. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissev v. Brewer*, 408 U.S. 471, 481 (1972).

Plaintiff, Intervenors and Class Members (hereafter "plaintiffs") argue that involuntarily hospitalized patients do not seek the appointment of independent psychiatrists at court proceedings because of the long delays such appointment causes in the proceedings, resulting in an impermissible chilling of their exercise of their right to a timely judicial hearing.

Plaintiffs contend that the delay in obtaining the testimony of independent psychiatrists is caused by the shortage of psychiatrists willing to perform such services, which in turn is caused, they argue, by the statutory limits on the compensation psychiatrists can receive for such services. Plaintiffs request a declaratory judgment that New York's procedures for the appointment of independent psychiatrists pursuant to Judiciary Law § 35(4), as applied in Dutchess County, violate due process.

Defendants maintain that the delay in obtaining testimony from independent psychiatrists results largely from the time required by the independent psychiatrists to conduct a thorough evaluation, given their other obligations as private practitioners, and to a small extent from the scheduling practices of the state judges in Dutchess County. Defendants deny that the statutory fee limits have led to a shortage of psychiatrists

willing to testify, and they deny the existence of any such shortage.

Before proceeding to our due process analysis, we consider defendants' contention that *Logan v. Arafeh*, 346 F. Supp. 1265 (D.Conn. 1972), *aff'd mem sub nom. Briggs v. Arafeh*, 411 U.S. 911 (1973) is dispositive of this case. *Logan* held that a Connecticut statute allowing the state to hold a person involuntarily committed to a mental institution for forty-five days without a judicial hearing did not violate due process. *Id.* at 1269. The instant situation is distinguishable, however, since it concerns a small sub-group of those persons who challenge their involuntary commitment, for whom the trier has determined that an accurate psychiatric evaluation requires the testimony of an independent psychiatrist. The instant situation, presenting a potentially greater danger of an inaccurate ruling, presents different due process concerns from the usual involuntary commitments at issue in *Logan*.

The Second Circuit has already sketched the due process analysis for the situation where "New York's procedures . . . do not provide access to the testimony of an independent psychiatrist when the presiding judge believes such testimony to be necessary," concluding that "a cognizable due process concern may arise." *Goetz*, 967 F.2d at 36. However, nothing has been presented to us in any way concerning the disappointment of presiding judges in obtaining psychiatric testimony. In fact, defendants have submitted an affidavit, uncontroverted by plaintiffs, from the Chief Clerk of the Supreme and County Courts of Dutchess County, who asserts that "[t]o my knowledge, there is no case in which the court appointed a psychiatrist pursuant to Judiciary Law § 35(4) in which this office was unable to obtain the services of a psychiatrist to perform such an evaluation."

The parties have led us instead to the issue of the constitutionality of the month-plus delays in involuntary commitment and retention hearings resulting from the appointment of an independent psychiatrist. Nevertheless, we will endeavor to adapt the Second Circuit's due process analysis to the facts presented to us.

As to the first prong of due process analysis, the interests of the individual, there is no genuine issue of material fact. The delays are real. The question is, does the individual have an interest in avoiding possibly unnecessary delays of at least a month in obtaining a hearing on his or her involuntary commitment due to the appointment of an independent psychiatrist, when the presiding judge believes that the psychiatrist's testimony is required for an accurate hearing?

In an earlier decision upholding the constitutionality of New York's procedures for involuntary civil commitment, the Second Circuit rejected appellants' argument that due process required an automatic preliminary probable cause hearing within forty-eight hours of commitment, followed by full commitment hearings within five days of commitment. *Project Release v. Prevost*, 722 F.2d 960, 974-75 (2d Cir. 1983). The court emphasized that existing law provided for professional and judicial review of involuntary retention, "including notice to relatives and others designated by the patient, and the availability of a judicial hearing within five days of demand by the patient, relative or friend, as well as habeas corpus relief." *Id.* at 975.

The court's emphasis on the availability of judicial review within five days of a demand suggests that persons involuntarily committed have an interest in reasonably speedy judicial review of their commitment or retention. This is especially so given the inevitable "massive curtailment of liberty" following involuntary commitment to a mental institution, *Vitek*, 445 U.S. at 491, and given that in the instant situation there is a heightened danger of an inaccurate determination of the subject's mental state.

Of course, *some* delay in the hearing is inevitable when an independent psychiatrist is appointed, since the independent psychiatrist must have time to conduct a thorough evaluation, and since by definition an independent psychiatrist is one who has professional responsibilities other than waiting around for § 35(4) appointments. The crucial question is thus whether the delays in the instant case are reasonable in the context of due process concerns. This brings us to the second and third prongs of due process analysis.

The second prong of due process analysis considers the probable value of remedial measures, and the risk of erroneous deprivation of the individuals' interests without such safeguards, while the third prong concerns the burden on the government. We will consider these two prongs in tandem, since the burden on the government of remedying an unconstitutional situation depends largely upon whether effective remedial measures are readily available to it.

Defendants have mounted a comprehensive challenge to the notion that there is any way to get independent psychiatrists in Dutchess County to complete their evaluations of involuntarily hospitalized patients in less than three to four weeks. Defendants rely principally on excerpts from depositions of the three Dutchess County psychiatrists who have been available to accept § 35(4) appointments in the past year. Defendants argue, with support from affidavits and depositions, (i) that independent psychiatrists in Dutchess County have commitments to their private patients such that the average practitioner requires four weeks to be ready to testify in court; (ii) that ordering independent psychiatrists to complete their § 35(4) appointments faster would simply make it harder to find psychiatrists willing to accept such appointments; (iii) that contrary to plaintiffs' assertions, psychiatrists have regularly received remuneration in excess of the statutory minimum for their § 35(4) appointments; (iv) that notwithstanding plaintiffs' allegation that shortages of psychiatrists have led to delays, there has never been any problem in obtaining a psychiatrist to perform a § 35(4) evaluation; and (v) that there are simply not enough psychiatrists in Dutchess County to supply an enlarged § 35(4) panel, as envisioned in one of plaintiffs' affidavits. Indeed, the record shows that recently two of the psychiatrists on the § 35(4) panel have withdrawn, citing the heavy caseload from their private patients.

Plaintiffs do not dispute that psychiatrists in Dutchess County can receive, and have received, more than the statutory maximum. However, they point out that the language of § 35(4) that the statutory maximum can be exceeded only in

"extraordinary circumstances" has a depressing effect upon the willingness of psychiatrists who accept appointments. They also point out that in New York City there are apparently a number of psychiatrists available to accept appointments and that they turn out reports more rapidly than they do in Dutchess County. However, they are quite vague about what this court can or should do about these situations. Indeed, plaintiffs' position is that it is not up to them to determine how the situation can be altered. Rather, it is up to the court to declare it a constitutional violation and to compel the State or the County to find some way to improve the situation. (The only thing certain that such a ruling would accomplish is to allow plaintiffs' counsel to receive a fee as a prevailing party.)

However, in light of the second and third prongs of due process analysis, we are unlikely to declare a situation unconstitutional when, due to the lack of effective remedial measures, such a declaration would place a considerable burden on the government. We turn, then, to the question of what can be done about the allegedly unconstitutional delays in obtaining independent psychiatric testimony.

Plaintiffs have submitted an affidavit from a public defender pointing out that the county has psychiatrists "under contract" who are used to perform psychiatric examinations of criminals pursuant to New York's Criminal Procedure Law, Article 730. These psychiatrists complete their evaluations within twenty-four hours of notification, and submit their reports the day after the evaluation. Plaintiffs imply that there is no reason why the state cannot have such psychiatrists for purposes of conducting the independent psychiatric evaluations at issue in this case. Defendants' affidavits establish, however, that the so-called "contract" psychiatrists are, in fact, independent contractors, who are specifically stated not to be officers or employees of the county, and who conduct examinations for a fee of $150 with apparently no extra payment for "extraordinary circumstances." Moreover, defendants have established that the reason Article 730 examinations can be completed so much quicker and less

expensively that § 35(4) evaluations is that determination of competency to stand trial presents a much simpler medical issue than determining whether a patient should remain involuntarily committed to a mental institution. In short, there is little to suggest that Article 730 evaluations present a model for lessening the delays in obtaining § 35(4) testimony.

In another of plaintiffs' affidavits, a psychiatrist suggests that if "the court" were to set the fee for § 35(4) examinations at a sufficiently high level there would be more psychiatrists willing to perform the examinations and to do them more rapidly. We have no doubt that this is true. However, "the court" (whether it the state court or this court) has no authority to set compensation rates. Indeed, if the Supreme Court of Dutchess County were to set different rates, it would have no funds for which to pay them unless the state legislature were to appropriate them.

By virtue of the earlier Court of Appeals decision, this court is left in an almost untenable position. If we were to hold a trial at this time, we might well determine that independent psychiatric evaluations can be concluded and hearings held in a week or two less time in New York City than in Dutchess County. Assuming that we determined that this week or two difference is a due process violation, we still do not see this court as having any powers by which to convert bucolic Dutchess County into a metropolitan center like New York City with a large concentration of psychiatrists, some of whom would be willing to undertake this sort of work. Nor do we see how Dutchess County could speed up independent psychiatric evaluations without undue burden.

The opinion of Judge Van Grafeilland, who concurred on the primary issue but dissented as to the remand on the issue considered herein, perceives some of the problems that this remand might produce. He notes:

> As I understand the plan proposed by my colleagues, it calls into question not only the appointment of a third expert, who is interested, but also the amount of his remuneration, and perforce the remuneration of the section 35 experts, which presently has a $200-$300 cap. In

> addition, the district court, upon remand, will have to take into account the alleged shortage of independent psychiatrists in Dutchess County, the likely duration of such shortage, and its effect on the $200-$300 statutory cap. A federal court is ill-equipped to determine what adjustments, if any, should be made, and is ill-advised to force such adjustments on the State of New York as being mandated by the United States Constitution.

967 F.2d at 38. That is precisely the position that we are in. Neither the majority opinion nor the concurring opinion indicate what, if anything, we should do in the present circumstances.[1] We have no authority to alter the statutory rates for compensating independent psychiatrists, and we will not declare a situation unconstitutional when plaintiffs have failed to demonstrate that there are any readily available governmental remedies. Consequently, we deny the plaintiffs' motion for summary judgment and grant the defendants' motion for summary judgment.[2]

SO ORDERED.

Dated: White Plains, New York
November 23, 1993

/s/ GERARD L. GOETTEL
GERARD L. GOETTEL
U.S.D.J.

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1 The concurring opinion of now Chief Judge Newman affords no additional assistance since it seems to be more of a dissent from the primary issue before the Court of Appeals as to whether there is a constitutional right to have a psychiatrist provided by the state to act as an expert witness opposing the position of state doctors.

2 We could, of course, deny both the motion and cross-motion for summary judgment and certify an interlocutory appeal. However, the Court of Appeals often refuses these invitations.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

88 Civ. 9134 (GLG)

LYLE R. GOETZ, individually and
on behalf of all others similarly situated,

Plaintiff,

MARK CANS and ANNA SELLETTI, individually and
on behalf of all others similarly situated,

Intervenors

—against—

The Honorable MATTHEW CROSSON, in his official capacity of chief administrator of the courts of New York, and DR. RICHARD C. SURLES, in his official capacity of Commissioner of the New York State Office of Mental Health,

Defendants.

APPEARANCES:

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OPINION

GOETTEL, D.J.:

This case challenges the procedures employed by the State of New York for involuntarily committing psychiatric patients in Dutchess County. We will presume familiarity with our earlier decision granting motions for intervention and class certification, and dismissing plaintiffs' claim relating to the fifth amendment's privilege against self-incrimination. *See Goetz v. Crosson*, 728 F. Supp. 995 (S.D.N.Y. 1990). Thus, only a brief recitation of the facts is required.

I. *FACTS*

Under New York law, the state may involuntarily hospitalize an individual for up to sixty days upon the signature of two physicians. N.Y. Mental Hyg. Law § 9.27(a). Once such an individual is committed, he can demand a retention hearing to contest his confinement. N.Y. Mental Hyg. Law § 9.31(a). If the state satisfies the criteria for retention, the state can hold the patient for the longer of sixty days from the date of admission or thirty days from the order denying the application for release. N.Y. Mental Hyg. Law § 9.33(a).[1]

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[1] The state must show by clear and convincing evidence that the patient "has a mental illness for which care and treatment as a patient in a hospital is essential to such person's welfare and whose judgment is so impaired that he is unable to understand the need for such care and treatment." N.Y. Mental Hyg. Law § 9.01; *see also In re Jeannette S.*, 157 A.D.2d 783, 550 N.Y.S.2d 383, 384 (2d Dep't 1990) ("hospital must establish, by clear and convincing evidence, that the patient is mentally

Once this time has expired, further retention is not permitted unless the state applies for a further order of retention, at which time the patient is entitled to a hearing before a justice of the supreme court. *Id.* Moreover, even if the patient has not challenged his initial commitment, the state must seek such an order if it wishes to detain him beyond the sixty-day period. N.Y. Mental Hyg. Law § 9.33(b). The patient can thereafter seek rehearing and review of any order of retention before a different justice of the same court. N.Y. Mental Hyg. Law § 9.35. At any of these hearings, the court may order the appointment of no more than two psychiatrists or psychologists to examine the patient and testify at the hearing. N.Y. Jud. Law § 35(4). The psychiatrists are hired at state expense with a cap of $300 if two are appointed and $200 if only one is appointed. The statute does, however, permit an application for greater fees in exceptional circumstances.

We previously certified as class plaintiffs involuntarily committed psychiatric patients located in Dutchess County. The two hospitals affected are Harlem Valley Psychiatric Center ("HVPC") and Hudson River Psychiatric Center ("HRPC"). Plaintiffs' complaint first seeks a declaration that the due process clause of the fourteenth amendment mandates that the state appoint an advocate psychiatrist to assist the patient and his counsel at retention hearings, much like the mandatory assignment of defense counsel in criminal matters upon a showing of financial need. Plaintiffs seek a further declaration that New York Judiciary Law section 35(4) fails to satisfy such constitutional dictates.[2] Defendants, in turn, suggest that the statute comports with any constitutional requirements that may exist. Plaintiffs now move for summary judgment. Defendants, while admitting that there are no genuine issues of material fact to be tried, do not bother to make a cross-motion for summary judgment. Nonetheless, it

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ill and in need of further care and treatment, and that the patient poses a substantial threat of physical harm to herself or others").

[2] We previously dismissed plaintiffs' claim that the forced submission of involuntarily committed mental patients to a psychiatric examination violated the fifth amendment's privilege against self-incrimination. *Goetz*, 728 F. Supp. at 1003.

is well settled that if the requisite showing is made, we can grant summary judgment to the non-moving defendants. *See Project Release v. Prevost*, 722 F.2d 960, 969 (2d Cir. 1983).

At HVPC, once the patient contests his detention, a non-treating psychiatrist, Dr. Howard Smoller, who is nonetheless a HVPC employee, examines the patient. Smoller is not the psychiatrist involved in the daily treatment of the patients whom he examines. Smoller, unless he determines that the patient should be released, then testifies on behalf of the state at a retention hearing. The procedure at HRPC, however, is somewhat different. There, even if the patient contests confinement, the treating psychiatrist will testify at the retention hearing. However, defendants contend that while there is no employee with responsibilities analogous to those of Dr. Smoller, the treating physician's findings are nonetheless reviewed by at least one supervisory doctor. Plaintiffs challenge this purported supervisory involvement (through counsel's conclusory claims we might add), and while this creates a disputed issue of fact, it is not one which is material. Thus, it does not prevent the granting of summary judgment.

In Dutchess County, the overwhelming majority of retention hearings are held before either Justice Judith Hillary or Justice John King, Acting Justices of the Supreme Court of the State of New York, County of Dutchess. Generally, one presides at the initial hearing and, if necessary, the other will conduct the section 9.35 rehearing. As noted, they have the power to appoint up to two psychiatrists to examine the patient and testify at the hearing. Plaintiffs contend that while Justice Hillary usually appoints a psychiatrist if requested by the patient's counsel, Justice King does so only about half the time such a request is made, often demanding that counsel justify the making of such a request. The evidence establishes that in recent years, only Dr. Werner Cohn has accepted such appointments in Dutchess County. We are told, however, that quite recently a second psychiatrist, Dr. Paul Garson, has agreed to handle such matters. While hearings are held on a weekly basis, Cohn apparently is available only one day each

month and plaintiffs suggest that this creates unreasonable delays.

II. DISCUSSION

Plaintiffs initially claim that there is a due process right to a psychiatrist who will be an advocate for the patient. Even if the psychiatrist ultimately cannot recommend that the patient be released, plaintiffs argue that the psychiatrist remains necessary to assist the patient's attorney with the case.

In support of this contention, plaintiffs assert that commitment proceedings are quasi-criminal and, hence, the same protections afforded criminal defendants regarding the appointment of psychiatrists must apply. There is no doubt that the Supreme Court has recognized an indigent *criminal* defendant's right to the appointment of a psychiatrist to assist the defendant and his counsel when the defendant's mental state is at issue. *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) (court must appoint psychiatrist to "conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense"). The Court stated that when mental state is relevant to culpability and punishment, "the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense." *Id.* at 80. Nonetheless, since we find that commitment proceedings are not criminal, we are not bound by the Court's ruling.

In previously dismissing plaintiffs' contention that their fifth amendment rights were violated, we concluded that retention proceedings under New York's Mental Hygiene Law were civil in nature. *See Goetz*, 728 F. Supp. at 1003. We relied, *inter alia*, on a decision of the Appellate Division, Second Department, which recognized that while criminal proceedings seek punishment and deterrence, the goal of retention proceedings is the "care and treatment" of the individual. *See Ughetto v. Acrish*, 130 A.D.2d 12, 518 N.Y.S.2d 398, 403 (2d Dep't), *appeal dismissed*, 70 N.Y.2d 871, 518 N.E.2d 8, 523 N.Y.S.2d 497 (1987). In addition, it is clear that the expedited time periods established by New York's legislature attempt to insure that "committed persons may be

released after the briefest time in confinement." *Allen v. Illinois*, 478 U.S. 364, 370 (1986). Finally, while wrongful confinement must be avoided whenever possible, "the layer's of professional review and observation of the patient's condition, and the concern of family and friends generally will provide continuous opportunities for an erroneous commitment to be corrected." *Addington v. Texas*, 441 U.S. 418, 428-29 (1979). The same cannot be said of an erroneously convicted criminal defendant. Therefore, we reaffirm our earlier conclusion that the proceedings at issue are civil in nature.

Plaintiffs contend that even if this is not a criminal or quasi-criminal proceeding, due process demands that patients be given access to a psychiatrist they can call their own. Furthermore, they claim that the current law in New York fails to satisfy these constitutional demands. Among the alleged deficiencies with section 35(4) of New York's Judiciary Law are the following: (1) it is discretionary whether or not to appoint the expert; (2) the expert is a court expert and does not assist the patients' counsel on medical matters; (3) Dr. Cohn is only available once a month, which leads to delays of three to six weeks from the time an expert is requested until a hearing is held; and (4) $200 is grossly inadequate to attract a sufficient number of psychiatrists.

It is uncontroverted that involuntary commitment constitutes a deprivation of liberty and implicates the fourteenth amendment's due process clause. *Addington*, 441 U.S. at 425. The issue, therefore, is determining the process to which plaintiffs are entitled. In resolving this question, the Supreme Court has announced a three prong test:

> The first is the private interest that will be affected by the action of the State. The second is the governmental interest that will be affected if the safeguard is to be provided. The third is the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided.

Ake, 470 U.S. at 77.

Turning to the first prong, we admit that plaintiffs have a strong interest in not being retained if they do not require treatment. Besides the loss of one's liberty, there is an obvious stigma attached to confinement in a mental hospital. *Addington*, 441 U.S. at 425-26. Nonetheless, we reject plaintiffs' argument that this interest is the equivalent of a criminal defendant's, which the Supreme Court recognizes as "almost uniquely compelling." *Ake*, 470 U.S. at 78. It must be remembered that the commitment of a mental patient is for treatment, not punishment. Moreover, in retention proceedings the state is not seeking to "overcome the presumption of innocence," *id.*, but rather, to protect society *and often the patient himself* from danger. *See Project Release v. Prevost*, 722 F.2d 960, 971 (2d Cir. 1983) (state has interest "in providing care for those in need of treatment for mental illness and in maintaining order and preventing violence to self and others").

The second interest to be balanced is that of the state in opposing plaintiffs' proposal. In this regard, the state has important financial concerns that must be considered. It could become extremely expensive if the state were forced to hire a psychiatrist for a patient in every instance in which one is demanded. As it stands now, the presiding judge has the discretion to make such an appointment. Moreover, it is not as if merely hiring one psychiatrist will always suffice. Rather, if there is a patient psychiatrist and a state psychiatrist, the court may well utilize section 35(4) to hire a court psychiatrist to resolve the dispute. As to the hiring of these individuals, if, as plaintiffs suggest, the $200 fee is presently inadequate, it will remain inadequate. Thus, the state would be forced to raise its reimbursement rates, which would obviously injure an already fragile state economy. We recognize, of course, that when liberty interests are at stake, the mere fear of financial harm to the state is insufficient to avoid constitutional dictates. Thus, we must turn to the third prong of the test.

The third factor to be considered contains two sub-parts, the first being the value of the additional safeguards and the

second being the risk of an erroneous deprivation of rights if the proposal is not implemented. As to the first issue, there is no doubt that a judge relies heavily on the testimony of psychiatrists in such situations. He does so because he usually is dealing with an unbiased doctor who has no stake in the ultimate decision to release or retain the patient.[3] However, plaintiffs' proposal suggests that psychiatrists will be retained as advocates and this may limit the extent to which a judge may rely upon their testimony. There are also a number of other problems with plaintiffs' proposal, some of which have already been alluded to. Merely appointing a psychiatrist for the patient will not necessarily protect his rights. If, for example, the state's expert and the patient's expert proffer inconsistent opinions, the judge will likely seek a third expert, at state expense, to resolve the dispute. In addition, implementing plaintiffs' proposal may be rather difficult if, as plaintiffs suggest, the $200 fee is inadequate to attract psychiatrists. However, we are not persuaded by this argument since there is evidence establishing that even at this rate, counties within New York City have been able to attract more than one or two psychiatrists to act as court experts.[4] It may simply be that there are insufficient numbers of psychiatrists available in a small county like Dutchess to handle the alleged demand.

Besides the problems with attracting psychiatrists, there are substantive problems that exist concerning plaintiffs' proposal. First, the proposal may create ethical problems for appointed psychiatrists. If, for example, the doctor believes the patient should remain hospitalized, the question arises whether his allegiance belongs to his client, who would be better served by remaining hospitalized, or the attorney, who

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[3] Of course, judges do not rely exclusively upon the opinions of experts for if the patient actually takes the stand, judges can make their own observations.

[4] Defendants claim that these other counties, which have more psychiatrists available for section 35 appointments, experience similar delays to those occurring in Dutchess County. This may result, however, from a greater incidence of involuntary commitments in these other areas.

wants to "win" the case. It is important to recognize that a hospitalized mental patient is very often dangerous to *himself* as well as to the community. This situation is different from that where an attorney is appointed for a criminal defendant and must provide an adequate defense even if he believes his client is guilty. While both the attorney and the doctor have obligations to their respective clients, the criminal defense attorney's client obviously is better served if he is not incarcerated. Other concerns, however, are at issue with physicians since releasing a mentally ill patient may not necessarily be in the patient's best interests. As the Supreme Court has recognized, "[o]ne who is suffering from a debilitating mental illness and in need of treatment is neither wholly at liberty nor free from stigma." *Addington*, 441 U.S. at 429.

Another concern raised by plaintiffs is that currently the court appointed expert often ends up testifying against the patient, thereby creating a disincentive for patients to request the appointment. We do not see what else could be required since the entire purpose of such proceedings is to determine the truth. If Dr. Cohn conducts an examination, he should be permitted to testify as to his findings. This concern would not be alleviated by the new proposal. First, the patient's psychiatrist could possibly be called as a witness for the state. Moreover, even if evidentiary rules prevented this, *see. e.g.*, N.Y. Civ. Prac. L. & R. 3101(d)(2), an issue upon which we express no opinion, it seems clear that an inference would be drawn if the doctor failed to testify. Plaintiffs seem to suggest that the doctor should conduct the examination, at state expense, but only testify if the patient likes what he is going to say. This seems to be an irrational approach in light of the purposes behind commitment proceedings. As to plaintiffs' need to call witnesses on their behalf, there is nothing preventing them from calling hospital employees, be they physicians or otherwise, to testify if they believe it would be helpful.

The next prong of the test is the risk of an erroneous deprivation of rights if the requested proposal is not implemented. In this regard, we must refer to the numerous protections

afforded plaintiffs under New York law. In consonance with the Supreme Court's decision in *Addington v. Texas*, 441 U.S. 418, 427 (1979), New York law requires a clear and convincing showing of both mental illness and a threat to oneself or others. *See supra* note 1. Moreover, the numerous levels of review available to patients more than adequately protect their rights. Before any involuntary commitment is permitted, two doctors must certify to such a need. Thereafter, there is the right to two hearings within a short period of time, before different judges, to contest retention.[5]

Additionally, state judiciary law specifically permits the appointment of court experts and Justices King and Hillary regularly make such appointments. The fact that Justice King does not always honor such requests does not interfere with plaintiffs' rights. There is nothing impermissible about a judge exercising his discretion in not appointing a court expert when he does not believe it would be profitable.[6]

Finally, when looking at whether plaintiffs' rights may be erroneously deprived if they are not given their own psychiatrist, we must look to the overriding purpose behind involuntary confinement. There is no concern with punishment or deterrence as exists in criminal cases and the state's goal is to permit functional, non-dangerous citizens to return to society as expeditiously as possible. Plaintiffs seem to ignore this fact. The care of the individual is of paramount concern.

For all the foregoing reasons, we find that the due process clause does not demand the appointment of a patient psychiatrist in retention hearings. Section 35(4) of the New York

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[5] In addition, HVPC employs a non-treating physician to examine the patient and testify at the hearing. Thus, an additional level of protection is afforded. While HRPC does not go this far, defendants contend that a supervisory physician verifies the treating physician's recommendation. As noted, plaintiffs do not necessarily recognize that such practices occur at HRPC. It is immaterial whether such review occurs or not, however, because of all the other safeguards built into the system. HVPC's practices are admirable, but superfluous.

[6] In fact, however, there is evidence that on at least a couple of occasions, Justice King appointed an expert when there had been no request made by the patient's counsel.

Judiciary Law affords plaintiffs all the protections to which they are entitled. Therefore, summary judgment for the defendants is granted and the clerk is directed to enter a judgment in their favor.

SO ORDERED.

Dated: White Plains, N.Y.
July 30, 1991

/s/ GERARD L. GOETTEL
GERARD L. GOETTEL
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

88 Civ. 9134 (GLG)

LYLE R. GOETZ, individually and
on behalf of all others similarly situated,
Plaintiff,

—against—

The Honorable MATTHEW CROSSON, in his official capacity of chief administrator of the courts of New York, the Honorable JOHN R. KING, in his official capacity of Acting Supreme Court Justice, the Honorable JUDITH A. HILLERY, in her official capacity of Acting Supreme Court Justice, and DR. RICHARD C. SURLES, in his official capacity of Commissioner of the New York State Office of Mental Health,
Defendants.

APPEARANCES:

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OPINION

GOETTEL, D.J.:

This action challenges the procedures by which an individual may be involuntarily committed to a psychiatric hospital in Dutchess County. The plaintiff alleges that the current practices of the Dutchess County Supreme Court violate the Due Process Clause of the Fourteenth Amendment by denying the involuntary committee access to psychiatric or other expert assistance at civil commitment or retention proceedings. The plaintiff further alleges that the failure to permit the committee to assert the fifth amendment privilege against self-incrimination during examination by a non-treating psychiatrist further violates the Due Process Clause. The plaintiff seeks to have his action certified pursuant to Fed. R. Civ. P. 23 as a class action seeking a declaration that an individual facing retention has the right to the appointment of a state-funded psychiatrist or other appropriate expert who would be available to testify on the patient's behalf if his clinical condition warrants such testimony and otherwise assist in the preparation and presentation of the patient's case. He further seeks to certify a second class to obtain a declaration that the patient may not be compelled to submit to psychiatric examinations conducted by a non-treating psychiatrist who may then testify adversely at the patient's retention proceeding.

The defendants have cross-moved to dismiss the action claiming that it is not ripe for adjudication and that the plaintiff's fifth amendment claim fails to state a claim upon which relief may be granted.

I. *CIVIL COMMITMENT*

Pursuant to New York Mental Hygiene Law, the State of New York may involuntarily hospitalize an individual for up to sixty days upon the signature of two physicians. N.Y. Mental Hyg. Law § 9.27(a) (1988). During this initial sixty-day period, an involuntarily hospitalized patient may request a hearing, known as a retention hearing, to contest his confinement. N.Y. Mental Hyg. Law § 9.31(a) (1988). If, within the sixty-day period, the State proves that a patient satisfies the criteria for involuntary hospitalization, the State may confine such individual for up to sixty days from the date of the patient's admission to a psychiatric facility or thirty days from the date of an order denying the application for the patient's release, whichever is longer. N.Y. Mental Hyg. Law § 9.33(a) (1988).

Once this time period has expired, the director of the facility in which the patient is confined must apply for an order of retention if the facility wishes to further hospitalize the patient. A facility must also apply for an order of retention if it wishes to retain beyond a sixty-day period an involuntary patient who has not previously challenged judicially his initial commitment. N.Y. Mental Hyg. Law § 9.33(b) (1988). A patient for whom a facility has sought an order of retention may request a court hearing to challenge his confinement. N.Y. Mental Hyg. Law § 9.33(a) (1988). If the court determines that a patient satisfies the criteria for involuntary hospitalization and signs an order of retention pursuant to N.Y. Mental Hyg. Law § 9.33, the patient may request a rehearing and review pursuant to N.Y. Mental Hyg. Law § 9.35 (1988).

II. *FACTS*

A. *Lyle Goetz*

The plaintiff, Lyle Goetz, was involuntarily committed to the Harlem Valley Psychiatric Center ("HVPC") on or about March 21, 1987 and has remained there pursuant to an order of retention that expired on February 6, 1989. On February 2, 1989, at a retention hearing held in New York State Supreme

Court, Dutchess County, Acting Supreme Court Justice Hillery ordered the plaintiff confined to the HVPC for a period not to exceed twenty-four months.[1] Because this hearing was conducted without notice to the plaintiff's attorney, upon motion of plaintiff's counsel Justice Hillery vacated the order of retention on March 16, 1989 and recused herself from further proceedings on the matter. Mr. Goetz's retention hearing was then assigned to Acting Supreme Court Justice King and placed on the calendar for March 23, 1989. Justice King also recused himself.[2] Subsequently, Mr. Goetz's retention proceeding was assigned to Supreme Court Justice Ralph Beisner. In June 1989, the plaintiff moved before Justice Beisner for the appointment of a psychiatrist pursuant to the fourteenth amendment and specifically requested Dr. Lawrence Siegel. The state opposed the motion but did not object to the appointment of a psychiatrist under section 35 of the Judiciary Law.[3] Pursuant to section 35, Justice Beisner

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[1] Defendants Hillery and King are both County Court Judges of Dutchess County and both serve as Acting Supreme Court Justices. The plaintiff contends that Justice Hillery presides over approximately 50 percent of the retention proceedings conducted in Dutchess County and that Justice King presides over the remaining 50 percent.

[2] Justice King recused himself because, *inter alia*, he had been asked to serve as a witness in a civil suit in which Mr. Goetz's attorney was a party.

[3] Judiciary Law § 35 permits a court "to appoint no more than two psychiatrists, certified psychologists or physicians to examine and testify at the hearing upon the condition of such person." N.Y. Jud. Law § 35(3) (Supp. 1990). Section 35 provides for compensation by the state in an amount not to exceed $200.00. *Id.* This section has become the focus of the plaintiff's complaint. The plaintiff challenges not only the court's reluctance to appoint psychiatrists under this section, but also the effectiveness of the statute itself. In essence, the plaintiff argues that the $200.00 compensation limitation severely limits the availability of expert witnesses willing to serve on the section 35 panel. Moreover, the plaintiff argues that once appointed under section 35, the psychiatrist is permitted to testify on behalf of either the patient or the facility seeking to retain the patient. Thus, the plaintiff argues, the patient is denied the right to an independent psychiatrist who is available to testify only on the patient's behalf in violation of his constitutional rights. Due to the posture of the present motions, we do not reach the merits of the plaintiff's claims at this juncture.

appointed Dr. Siegel. Dr. Siegel declined appointment and the court subsequently appointed Dr. Werner Cohn. Dr. Cohn examined Mr. Goetz and testified at Mr. Goetz's retention hearing in August 1989. He was called, however, as a witness for the hospital and was cross-examined by Mr. Goetz's attorney. At the conclusion of the hearing, Justice Beisner ordered Mr. Goetz retained.

B. *Mark Cans*

In May 1989, the court received a motion by Mark Cans to intervene and serve as class representative. Mr. Cans has been confined involuntarily in the HVPC since approximately May 27, 1987. Mr. Cans' order of retention expired on June 17, 1989. As Mr. Cans did not wish to be further involuntarily retained, the HVPC commenced a retention hearing. Both defendants Hillary and King recused themselves and the matter was assigned to Justice Beisner. Mr. Cans moved for the appointment of a psychiatric expert pursuant to the fourteenth amendment. The state opposed Mr. Cans' motion but did not object to appointment pursuant to section 35. Justice Beisner appointed Dr. Lawrence Siegel pursuant to section 35 of the Judiciary Law. Dr. Siegel declined the appointment and Dr. Cohn was appointed. Dr. Cohn also declined the appointment and indicated an intention to do so in any case in which plaintiff's counsel herein represents the patient. The application for further retention of Mr. Cans remains *sub judice* in Supreme Court, Dutchess County.

C. *Anna Selletti*

In August 1989, Anna Selletti moved to intervene and serve as class representative. Ms. Selletti is an involuntarily retained psychiatric patient at the HVPC whose order of retention expired on September 10, 1989. Ms. Selletti's retention hearing is currently pending before Justice Beisner. Presumably because of the setbacks experienced by the other parties to this action, she has not requested appointment of an independent psychiatrist.

III. *INTERVENTION*

Initially, we consider the motions to intervene made by Mark Cans and Anna Selletti. Under Fed. R. Civ. P. 24(b), anyone may be permitted to intervene, upon timely application, "when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Clearly proposed intervenors Cans and Selletti share common questions of law with the plaintiff. Indeed, the claims raised by the proposed intervenors are identical to those raised by the plaintiff. No prejudice will result from the intervention. Consequently, the motions of Mark Cans and Anna Selletti to intervene as plaintiffs in this action is granted.[4]

IV. *JUSTICIABILITY*

The defendants move to dismiss the action on the grounds that none of the plaintiffs present a justiciable case or controversy. Indeed, this case presents a text book model of the interplay of the various Article III doctrines. At the commencement of this action, Lyle Goetz's retention hearing had not yet been scheduled and he had not yet requested psychiatric assistance. Thus, the defendants moved to dismiss for lack of ripeness. When Mr. Goetz came before Justice Beisner and was appointed a psychiatrist pursuant to Judiciary Law section 35, the defendants contended that the action was moot. The defendants have made similar arguments with respect to intervenors Cans and Selletti.[5] We must consider,

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[4] The question of whether either Mr. Cans or Ms. Selletti present a justiciable controversy will be considered *infra*.

[5] In the last series of submissions on these motions, the plaintiffs' attorney indicated that, in light of both the unavailability of any psychiatrist willing to take a section 35 appointment, and the court's prior treatment of such applications, he did not move for psychiatric assistance on behalf of Anna Selletti. He also suggested that, after Dr. Cohn's declination of the appointment, Mark Cans would no longer be vigorously pursuing appointment of an independent psychiatrist. In response to these

therefore, whether any or all of the plaintiffs present a ripe and justiciable case or controversy.

A. *Ripeness*

Justiciability is an expansive concept which embodies, *inter alia*, the overlapping doctrines of ripeness, standing and mootness. *See Flast v. Cohen*, 392 U.S. 83, 94-97 (1968). The ripeness doctrine requires that an action brought in federal court be "matured to a point that warrants decision." 13A C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3532, at 112 (2d ed. 1984). The defendants initially contended that a plaintiff in this action could not assert a ripe case or controversy until they had requested and been denied psychiatric assistance. We note, however, that "'[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough [to prevent dismissal on ripeness grounds].' " *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974) (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)). When the defendants sought to retain the plaintiff past the expiration of his term of commitment, and the plaintiff expressed an intention to seek the appointment of an independent psychiatrist, we think a ripe controversy was presented. At that point, the only act left to be taken was the grant or denial of the plaintiff's request. A denial of the request would likely lead to an immediate hearing and decision on future commitment. We think the plaintiff should not be required to wait until after the hearing, and risk possible re-commitment, to assert his constitutional challenge. *See Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983) ("[R]ipeness turns on 'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.' " (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967))).

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pronouncements, counsel for the defendants argued that the action as to these parties is now moot. The mootness doctrine is examined *infra*.

Both plaintiffs Goetz and Cans have come before Justice Beisner at a retention hearing and requested appointment of an independent psychiatrist. Thus, both of these plaintiffs, at least at some point, presented ripe controversies.[6] Anna Selletti has not requested appointment, allegedly due to the defeats suffered by her co-plaintiffs. In light of the identical decisions rendered by Justice Beisner in *Matter of Goetz* and *Matter of Cans*, and the indication that there is currently no psychiatrist in Dutchess county who will accept section 35 appointments, at least where plaintiff's attorney is counsel, we hold that, even in the absence of a specific motion for appointment of a psychiatrist, Ms. Selletti nonetheless presents a ripe controversy. The law does not require the doing of a futile act. *Cf. Ohio v. Roberts*, 448 U.S. 56, 74 (1980) (government need not pursue unavailable witness); *Munchak Corp. v. Cunningham*, 457 F.2d 721, 725 (4th Cir. 1972) ("Equity does not require the doing of a futile act as a condition to the granting of equitable relief."). All plaintiffs stand to suffer great hardship—loss of their personal liberty—were we not to act at this time. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). Consequently, the plaintiffs' action is ripe for adjudication.

B. *Mootness*

As the ripeness problem asserted by the defendants has been overcome, the defendants now argue that the action is moot. "[M]ootness represents a time dimension of standing, requiring that the interests originally sufficient to confer standing persist throughout the suit." 13A C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3533.1, at 220 (2d ed. 1984). The mootness doctrine also ensures that a ripe cause of action remain so throughout the course of the litigation. If, at any time, the parties cease to

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6 "[R]ipeness is peculiarly a question of timing." *Buckley v. Valeo*, 424 U.S. 1, 114 (1976) (per curiam) (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102. 140 (1974)). Consequently, the occurrence of intervening events is appropriately considered in evaluating ripeness. *Id.* at 113-14.

present a live controversy, the action is moot and dismissal is appropriate. The defendants argue that because Justice Beisner has granted the plaintiffs the relief they seek—appointment of a section 35 psychiatrist—the action has been rendered moot.[7]

The plaintiffs argue that their action is not moot because they have not received, for all practical purposes, the relief they seek. The plaintiffs challenge the constitutionality of section 35, not only for its under-utilization, but also for its practical inadequacies. *See supra* note 3. Although plaintiff Goetz's application for appointment of a psychiatrist was granted, he nonetheless complains that he lacked sufficient opportunity to consult with and utilize the psychiatrist to his advantage. The remaining plaintiffs have not received any of the relief they seek as there is currently no psychiatrist willing to accept a section 35 appointment to these plaintiffs. The plaintiffs' allegation that the compensation allowed by section 35 is inadequate to provide the plaintiffs with effective psychiatric assistance may be established by the refusal of two psychiatrists to assist Mr. Cans, though other factors may be involved. Although we do not now rule on whether the United States Constitution requires more than the plaintiffs have received, we do not think that the plaintiffs' claims have been mooted by the appointment of a psychiatrist to examine Mr. Goetz and testify at his hearing.

Even were we to find that the named plaintiffs' claims had been rendered moot, we would nonetheless deny the defendants' motion. In instances where a named plaintiff's claim has become moot after a motion for class certification has been filed, the relation-back doctrine provides an exception to the mootness rule.

> There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. In such instances,

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[7] Although Ms. Selletti has not moved for appointment of a psychiatrist, the defendants claim that her action is nonetheless mooted by her intention not to request such appointment.

> whether the certification can be said to "relate back" to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review.

Sosna v. Iowa, 419 U.S. 393, 402 n.11 (1975). *Accord Jones v. Califano*, 576 F.2d 12, 22 (2d Cir. 1978); *White v. Mathews*, 559 F.2d 852, 857 (2d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); *Mathis v. Bess*, 692 F. Supp. 248, 258-59 (S.D.N.Y. 1988); *Jane B. v. New York City Dep't of Social Services*, 117 F.R.D. 64, 67-69 (S.D.N.Y. 1987). "The *Sosna* exception . . . extends to cases in which the motion for class certification was filed before the action became moot as to the named plaintiff."[8] *Jane B.*, 117 F.R.D. at 69; *accord Jones*, 576 F.2d at 22.

Of particular concern is the potential ability of the defendant to purposefully moot the named plaintiffs' claims after the class action complaint had been filed but before the class had been properly certified. *White*, 559 F.2d at 857; *Mathis*, 692 F. Supp. at 258. That concern is very real in this action. The state court's decision to appoint a psychiatrist pursuant to section 35 to both plaintiffs Goetz and Cans could be construed as an attempt to squelch a spark before it turns into a conflagration. A conclusion that the plaintiffs' claims were now moot "would mean that the [state court system] could avoid judicial scrutiny of [their] procedures by the simple expedient of granting [relief] to plaintiffs who seek, but have not yet obtained, class certification." *White*, 559 F.2d at 857.

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[8] Most of the above-cited cases link the relation-back doctrine to a finding of a justiciable controversy at the time the complaint and the class certification motion were filed. In this case, the original motion for class certification was filed on January 19, 1989, along with the class action complaint. Although plaintiff Goetz's claim may not have been ripe at the time of filing, it has ripened into a cognizable claim during the pendency of the class certification motion. The rationale for the relation-back doctrine is equally served by applying it under these circumstances. So long as a justiciable controversy existed some time prior to class certification, a subsequent mooting of the named plaintiff's claims will not preclude class certification.

Under these circumstances, application of the relation-back doctrine is appropriate.

Moreover, the transitory nature of the plaintiffs' claims bolsters our conclusion that their class action is not moot. As stated by the Supreme Court, "[s]ome claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires." *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 399 (1980). If, as we have concluded, the plaintiffs' claim does not ripen until he has requested psychiatric assistance, it would be virtually impossible to file a class action complaint before a determination has been rendered on that request. Once the plaintiffs' motion has been denied, he has lost the opportunity to seek prospective relief. If the motion is granted, his claim is moot. The life span of the plaintiffs' claim is simply too short to ensure judicial review before mootness mandates dismissal. Under these circumstances, the relation-back doctrine will intervene to ensure that the justiciable class action claim is heard. *See Jane B.*, 117 F.R.D. at 67-68.

Finally, the existence of many similarly situated persons who are likely to face the same "Catch-22" warrant application of the relation-back doctrine. As in *Gerstein v. Pugh*, 420 U.S. 103 (1975), "in this case the constant existence of a class of persons suffering the deprivation is certain. The attorney representing the named respondents is a public defender, and we can safely assume that he has other clients with a continuing live interest in the case." *Id.* at 399; *accord Jane B.*, 117 F.R.D. at 68.[9]

In sum, we reject the defendants' claim that the plaintiffs' action is moot. Our holding rests primarily on the conclusion that the plaintiffs have not been granted all the relief they seek. Even if their claims were satisfied, however, we would nonetheless reject the mootness challenge as the plaintiffs seek to pursue this action as representatives of a class of similarly situated persons.

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[9] Although the plaintiffs' attorney is not a public defender, he is representing this class of plaintiffs *pro bono* through the Mental Disability Law Clinic at Touro College School of Law.

V. *SELF-INCRIMINATION*

Before evaluating the plaintiffs' motion for class certification, we first must consider the defendants' motion to dismiss, for failure to state a claim, the plaintiff's claim that due process requires that the fifth amendment privilege against self-incrimination be applied to civil commitment proceedings. The Fifth Amendment privilege, which applies to the states through the Fourteenth Amendment, *Malloy v. Hogan*, 378 U.S. 1 (1964), provides that "no person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The protection of the fifth amendment permits an individual to refuse to "answer official questions put to him in any . . . proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973); *accord Minnesota v. Murphy*, 465 U.S. 420, 426 (1984).

The question of the application of the privilege against self-incrimination to civil commitment proceedings was recently addressed by the Supreme Court in *Allen v. Illinois*, 478 U.S. 364 (1986). *Allen* involved a proceeding to determine whether a defendant who had engaged in criminal conduct was in need of involuntary psychiatric care and treatment as a "sexually dangerous person" pursuant to Illinois state law. *Id.* at 365-66. The threshold question posed by the Court in determining whether the Fifth Amendment privilege applied to such proceedings was whether the commitment proceedings were criminal or civil in nature. *Id.* at 368. To resolve this issue, the Court first examined the language of the Illinois statute that declared the proceedings to be civil. *Id.* Recognizing, however, that punitive purposes may underlie a civil label, the Court analyzed the nature of the proceedings to determine if despite the stated treatment purpose of the scheme, the process was actually punitive in nature, thereby rendering it a criminal proceeding. *Id.* at 369. Concluding that the plaintiff failed to sustain its burden of proving that the commitment scheme had a criminal purpose, the Court concluded that the privilege against self-incrimination did not apply to the Illi-

nois retention proceedings. *Id.* at 375. In so doing, the Court specifically rejected as "not good law," *id.* at 372, broad language in *In re Gault*, 387 U.S. 1 (1967) that "our Constitution guarantees that no person shall be 'compelled' to be a witness against himself when he is threatened with deprivation of his liberty." *Id.* at 50.

The petitioner in *Allen* further argued, as does the plaintiff herein, that even if the commitment proceedings at issue were not criminal, the due process guarantees of the fourteenth amendment independently require application of the privilege. In rejecting this contention, the Court declined to hold that "the Due Process Clause of its own force requires application of the privilege against self-incrimination in a noncriminal proceeding, where the privilege claimant is protected against his compelled answers in any subsequent criminal case." *Allen*, 478 U.S. at 374. The Due Process Clause requires certain procedural safeguards before a person may be deprived of life, liberty or property to guard against the risk of erroneous deprivation. *Mathews v. Eldridge*, 424 U.S. 319, 333-35 (1976). Application of the privilege of self-incrimination to civil commitment proceedings, however, will not advance the reliability of the commitment process. *Allen*, 478 U.S. at 374. The fifth amendment privilege, therefore, "has no place among the procedural safeguards discussed in *Mathews v. Eldridge*, which are designed to enhance the reliability of [the factfinding] process." *Allen*, 478 U.S. at 375. Accordingly, the *Allen* Court determined that the Illinois commitment proceedings "were not 'criminal' within the meaning of the Fifth Amendment to the United States Constitution, and that due process does not independently require application of the privilege." *Id.*

The Supreme Court's analysis applies equally to the civil retention proceedings at issue in this case. This issue was squarely addressed by the New York Supreme Court, Appellate Division, Second Department and we find their discussion persuasive.[10]

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[10] Indeed, the *Ughetto* action was commenced by the plaintiff's attorney herein and defended in part by defense counsel in this case. Moreover, *Ughetto* challenged the procedures of the Harlem Valley Psy-

> It is clear that facially the involuntary commitment proceedings under the Mental Hygiene Law are civil and not criminal in nature. Furthermore, upon an examination of the statutory scheme, it is equally apparent that the overall purpose of the proceedings, including the prehearing interview, is to ensure that patients receive the care and treatment that is necessary based upon their condition and is not for the purpose of exacting punishment. . . . Further, as is made clear in *Allen* in its rejection of *Gault*, the mere fact that statements adduced during the interview will be used at a hearing, which may result in confinement and a deprivation of liberty, will not suffice to convert the nature of the proceeding from civil to criminal.

Ughetto v. Acrish, 518 N.Y.S.2d 398, 403 (2d Dep't), *appeal dismissed*, 70 N.Y.2d 871 (1987). We hold, therefore, that the fifth amendment privilege against self-incrimination does not apply to the civil commitment proceedings that are the subject of this litigation. Neither the fifth nor the fourteenth amendments of the United States Constitution require such application and valuable precedent leads us to conclude that its application would be inappropriate in the civil retention proceedings at issue herein. Accordingly, the defendants' motion to dismiss the plaintiff's third cause of action for failure to state a claim is granted.

VI. *CLASS CERTIFICATION*[11]

The plaintiffs seek to certify a class of all individuals civilly committed within Dutchess County who will request retention hearings to challenge their hospitalization. Initially, because we have concluded that a ripe controversy does not

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chiatric Center, the facility in which the plaintiff herein is involuntarily held.

[11] The plaintiffs seek certification of two subclasses. The first subclass would assert the constitutional challenge to the current retention procedure and section 35 of the Judiciary Law. The second subclass would raise the fifth amendment challenge discussed above. Having dismissed the third cause of action containing that claim, we need only consider the first of the plaintiffs' proposed classes.

arise until psychiatric assistance is requested, the class must be redefined as all individuals civilly committed within Dutchess County who will request retention hearings to challenge their hospitalization and will further request the assistance of an independent psychiatrist.

Having placed most of their eggs in the justiciability basket, the defendants do not raise serious questions as to the propriety of class certification. The sole point in opposition that we have gleaned from the defendants' papers is that the plaintiffs' claims are not typical of the class because their retention hearings have been held before Justice Beisner while the named defendants are Justices King and Hillery. The plaintiffs have established, by affidavit testimony, that defendants King and Hillery collectively presided over nearly 100 percent of the retention hearings held in Dutchess County before this litigation was commenced. The plaintiffs' hearings have been held before Justice Beisner largely because Justices King and Hillery had been named as defendants in this action. Thus, the fact that the majority of the putative class members may appear before different Justices than the plaintiffs is a condition that cannot be avoided and it does not defeat class certification.

There can be little question that the putative class satisfies the numerosity requirement of Fed. R. Civ. P. 23(a). Plaintiffs' counsel estimates that one hundred to two hundred individuals from the HVPC alone request retention hearings each year, and approximately one quarter of those patients request psychiatric assistance. *See Korn v. Franchard Corp.*, 456 F.2d 1206, 1209 (2d Cir. 1972) (class of 40 sufficiently numerous); *see also Deary v. Guardian Loan Co.*, 534 F. Supp. 1178, 1190 (S.D.N.Y. 1982) (numerosity need not be demonstrated with precision). Moreover, the membership of the class is constantly changing.

> The fluid composition of the . . . population is particularly well suited for status as a class because while the identity of the individuals involved may change, the nature of the harm and the basic parameters of the group affected remain constant.

Bruce v Christian, 113 F.R.D. 554, 557 (S.D.N.Y. 1986). Consequently, the first prong of class certification is satisfied.

The plaintiffs also have no problem meeting the commonality aspect of Rule 23(a)(2) which requires that there be common questions of law or fact shared by the putative class members. There is no question that the claims raised by the plaintiffs are common to all members of the putative class. Indeed, there are few, if any, factual issues to contend with. The question of whether the fourteenth amendment requires the appointment of a psychiatrist who is available to testify promptly on the patient's behalf if his clinical condition so warrants and otherwise assist in the preparation of the patient's case is purely a question of law and its resolution is of concern to all potential class members.

Despite the defendants' contention that the different presiding Justices render the plaintiffs' claims different from those of the class, we find that the plaintiffs' claims are typical of other class members. The typicality and commonality requirements "serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interest of the class members will be fairly and adequately protected in their absence." *General Tel. Co. v. Falcon*, 457 U.S. 147, 157 n.13 (1982). Despite the peculiar circumstance of differing presiding Justices as to the named plaintiffs, their claims are typical of the class members' and there is no indication that the named plaintiffs will not fairly and adequately litigate the class claims. Finally, there has been no suggestion that counsel for the class is less than able to adequately represent the class interests.

Having satisfied the requirements of Rule 23(a), we find that the proposed class, as modified, can properly be certified under Rule 23(b)(2) because "the part[ies] opposing the class [have] acted . . . on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). Although reliance on Rule

23(b)(2) generally requires additional reasons for obtaining certification, *Davis v. Smith*, 607 F.2d 535, 540 (2d Cir. 1978), that justification is present by the threat of mootness if a class is not certified. *Alston v. Coughlin*, 109 F.R.D. 609, 612 (S.D.N.Y. 1986). As discussed above, the membership of the proposed class is transitory as patients are released, recommitted or elect to remain voluntarily. *Cf. id.* at 611-12 (class of prisoners certified because release or transfer to other prison would moot claim of overcrowding). Moreover, the possibility that the defendants could intentionally moot the named plaintiffs' claims sufficiently justifies class certification. *See supra*. "The plaintiffs' interest in averting the possibility of the action becoming moot with the concomitant interest in judicial economy, makes class certification in this case more than an empty formality . . . ." *Id.* at 612. Were we not to certify this class, the claims asserted by the plaintiffs might be rendered moot prior to resolution. Consequently, the class is certified pursuant to Rule 23(b)(2).

VII. CONCLUSION

In sum, the defendants' motion to dismiss the third cause of action for failure to state a claim is granted. The defendants' motion is in all other respects denied. The motions to intervene and serve as class plaintiffs by Mark Cans and Anna Selletti are granted and the plaintiffs' motion to certify a class to pursue the first and second causes of action is granted.

SO ORDERED.

Dated: White Plains, N.Y.
January 12, 1990

/s/ GERARD L. GOETTEL
GERARD L. GOETTEL
U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Dkt No. 93-9357
Filed February 2, 1995

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 2nd day of February one thousand nine hundred and ninety-five.

Goetz

—v.—

Crosson

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellants LYLE R. GOETZ, MARK CANS, and ANNA SELLETTI.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: CAROLYN CLARK CAMPBELL
Carolyn Clark Campbell,
Chief Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

88 Civil 9134(GLG)
Filed November 30, 1993

Lyle R. Goetz, individually, and
on behalf of all others similarly situated,
Plaintiff,

Mark Cans and Anna Sellettti, individually,
and on behalf of all others similarly situated,
Intervenors,

—against—

The Honorable Matthew Crosson, in his official capacity of chief administrator of the courts of New York, and Dr. Richard C. Surles, in his official capacity of Commissioner of the New York State Department of Mental Health,
Defendants.

JUDGMENT

Whereas the above entitled action having been assigned to the Honorable Gerard L. Goettel, U.S.D.J., and the Court thereafter on November 23, 1993, having handed down its opinion, denying the plaintiffs' motion for summary judgment and granting the defendants' motion for summary judgment, it is,

ORDERED, ADJUDGED AND DECREED: That the plaintiffs' motion for summary judgment is denied and the defendants' motion for summary judgment is granted.

Dated: White Plains, New York
November 30, 1993

/s/ JAMES M. PARKISON
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

88 Civil 9134(GLG)
Filed July 30, 1991

Lyle R. Goetz, individually, and
on behalf of all others similarly situated,
Plaintiff,

Mark Cans and Anna Selletti, individually,
and on behalf of all others similarly situated,
Intervenors,

—against—

The Honorable Matthew Crosson, in his official capacity of chief administrator of the courts of New York, and Dr. Richard C. Surles, in his official capacity of Commissioner of the New York State Department of Mental Health,
Defendants.

JUDGMENT

Whereas the above entitled action having been assigned to the Honorable Gerard L. Goettel, U.S.D.J., and the Court thereafter on July 30, 1991, having handed down its opinion granting summary judgment in favor of the defendants, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed.

Dated: White Plains, New York
July 30, 1991

/s/ JOSEPH F. CLORDT
Acting Clerk

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment of the United States Constitution provides in relevant part:

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law: nor deny to any person within its jurisdiction the equal protection of the laws.

New York Mental Hygiene Law Section 9.31 provides in relevant part:

> **(a)** If. at any time prior to the expiration of sixty days from the date of involuntary admission of a patient on an application supported by medical certification, he or any relative or friend or the mental hygiene legal service gives notice in writing to the director of request for hearing on the question of need for involuntary care and treatment, a hearing shall be held as herein provided.
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> * * *
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> **(c)** The court which receives such notice shall fix the date of such hearing at a time not later than five days from the date such notice is received by the court and cause the patient, any other person requesting he hearing, the director, the mental hygiene legal service, and such other persons as the court may determine to be advised of such date.

New York Judiciary Law Section 35 provides in relevant part:

> **1.a.** When a court orders a hearing . . . in a civil proceeding to commit or transfer a person to or retain him in

a state institution when such person is alleged to be mentally ill, mentally defective or a narcotic addict, . . . the court may assign counsel to represent such person if it is satisfied that he or she is financially unable to obtain counsel.

* * *

4. In any proceeding described in paragraph (a) of subdivision one of this section, when a person is alleged to be mentally ill, mentally defective or a narcotic addict, the court which ordered the hearing may appoint no more than two psychiatrists, certified psychologists or physicians to examine and testify at the hearing upon the condition of such person. A psychiatrist, psychologist or physician so appointed shall upon completion of his services, receive reimbursement for expenses reasonably incurred and reasonable compensation for such services, to be fixed by the court. Such compensation shall not exceed two hundred dollars if one psychiatrist, psychologist or physician is appointed, or an aggregate sum of three hundred dollars if two psychiatrists, psychologists or physicians are appointed, except that in extraordinary circumstances the court may provide for compensation in excess of the foregoing limits.